THE BOOK WAS DRENCHED

PRINCIPLES AND LAW
OF
ACCIDENT INSURANCE

PRINCIPLES AND LAW OF ACCIDENT INSURANCE

BY

G. E. BANFIELD, A.C.I.I.

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW

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THE CHARTERED INSURANCE INSTITUTE

INSURANCE HANDBOOK No. 5

This handbook is approved by The Chartered Insurance Institute and is designed specially for the use of students.

PREFACE
TO THE FIFTH EDITION

THIS Edition follows somewhat closely upon the Fourth Edition, the supply of which was quickly exhausted by the needs of insurance students, many of whom had but shortly returned from the Forces. Meanwhile, the book has been approved by The Chartered Insurance Institute for the use of students in the subject of Law of Accident Insurance.

In the space of the last two or three years, certain new legislation has come into effect, notably the National Insurance Act, 1946, and the National Insurance (Industrial Injuries) Act, 1946, both of which became operative as from 5th July, 1948. Following upon the repeal of the Workmen's Compensation Acts thereby, employers' liability insurance ceased to be a separate class of assurance business for the purposes of the Assurance Companies Acts, 1909 to 1946. The Companies Act, 1948, has consolidated and amplified earlier company legislation. The Law Reform (Personal Injuries) Act, 1948, has abolished the doctrine of common employment.

The general law governing the interpretation of contracts of accident insurance remains undisturbed by legislation. There is a strong inference that the business of insurance has been soundly conducted and that, with the financial standards introduced in 1946, insurers can be relied upon to maintain the high traditions established over many years of trading.

Accident insurance comprises a series of classes of insurance, each of which entails specialized study and in the main a wide knowledge of commercial activity. It can confidently be said that a knowledge of general principles is an essential basis for specialized study of any particular class of insurance, and of real practical value in the day-to-day transaction of business.

G. E. BANFIELD

PREFACE
TO THE FIRST EDITION

THE principles of law which form the basis of sound dealing in the practice of insurance are, in the main, identical with those appertaining to the practice of any other branch of commerce. To the uninitiated, "The Law" may be at times profound. A slight penetration under the crust, and there still remains that feeling of mystery at the intricacies of the system which controls our civil life. The law is not mathematical, and so vast are the problems that come within its embrace, so varying

the circumstances, that it is nigh an impossibility to reduce any branch to a succinct body of rules which can be relied upon for application to all phases of our daily affairs. Sound principles may be laid down in the case of *Smith* v. *Jones*, but, however similar may be the case of *Robinson* v. *Brown*, there may be some distinction, however small, which may result in an absolutely opposite verdict. "A little learning is a dangerous thing," and in no sphere could this saying be truer than in the subject now concerned.

However, with this warning well in mind, readers are invited to contemplate the broad principles of the law of insurance. In so small a compass this book cannot be more than an outline and, having absorbed its contents, the practical man has then to apply these principles in a practical manner to the problems of his profession. The aims of the author are, first, that this book shall serve as an introduction of a readily digestible nature to the wealth of knowledge contained in the bulkier tomes written by the recognized authorities on the legal problems of our profession; and, secondly, that the basic principles of insurance shall first be drilled into the mind before attempt is made to widen knowledge. To the practical man it is hoped that this volume will freshen the knowledge of principles which may at times become dim in the stress of business, to the young student that it will reveal in some measure the code of rules which underlies the practical side of insurance of any kind.

It is perhaps necessary in this Preface to explain that whilst this book is entitled *Principles and Law of Accident Insurance*, yet the law therein explained permeates in its broad principles every branch of insurance, whether Fire, Life, Accident, or Marine. Sectionalizing in one particular branch, e.g. the Accident branch, is mainly a matter of clarifying maxims and principles of insurance by illustrations as far as possible of "Accident" cases. In many instances it is necessary to illustrate "Accident" Law by reference to leading decisions in Fire, Life, and Marine insurance. In short, Accident principles are in the main identical with Fire, Life, and Marine principles, and vice versa.

In order to grasp more readily the application of Principles to Practice, readers are strongly advised, when reading the text, to refer forthwith to the Appendices when cases are quoted.

The author is indebted to his friends, Mr. J. B. Welson, LL.M., F.C.I.I., F.C.I.S., Barrister-at-Law, for encouragement in the task of reducing to more modest dimensions the volume of legal principles affecting the practice of accident insurance, and Mr. P. B. Showan, Barrister-at-Law, for his kindly and valuable criticisms.

G. E. BANFIELD

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THE CHARTERED INSURANCE INSTITUTE
EXAMINATION SYLLABUS

The contents of this book will be found to deal with the matters in the Syllabus in the following two Accident Branch subjects—

PRINCIPLES AND PRACTICE
LAW OF ACCIDENT INSURANCE

PRINCIPLES AND LAW OF ACCIDENT INSURANCE

CHAPTER I

A CONTRACT

ELEMENTS of a contract—Formal and simple contracts—Capacity to contract—Consensus—Legality

For Cases and Statutes cited herein, see Appendixes

(1) ELEMENTS OF A CONTRACT

THE law of insurance is the law appertaining to a particular class of contracts; in other words, it is the law of contract applied to contracts of insurance. In addition to the general features of the law of contract, contracts of insurance are affected by a special feature known as the "utmost good faith" (*uberrima fides*). It is, therefore, of importance not only to acquire a knowledge of the general principles of the law of contract, but also to understand what is meant by *uberrima fides*.

The law of contract is made up of the rules by which the courts of law regulate and enforce the obligations entered into between individual and individual, and, therefore, concerns itself with the nature of contracts and the consequent relations between the parties thereto, their agents, and other persons who may be affected by such contracts. The law between individual and individual is, in Great Britain, divided into three parts—common law, equity, and statute law—of which the first two predominate in the law of contract.

COMMON LAW

Common law is conveniently, though not perhaps accurately, termed "unwritten" law, in that it does not relate to any code of rules formulated by the legislature of the State for the domestic affairs of its citizens, such as may be found in other countries (e.g. France), but consists of a body of precedents established by the decisions of learned judges of the King's Courts throughout many centuries and recorded verbatim by men of legal training in what are known as law reports.

EQUITY

Equity consists of a similar record of the principles built up by the decisions of the judges of the Court of Chancery in matters in which the common law had either no remedy or an inadequate remedy. Since the merging of the Courts of law and equity by the Judicature Act, 1873, both legal and equitable remedies can be obtained in either Court in the one set of proceedings, e.g. specific performance and damages.

Where there is a conflict between the two systems the law of equity prevails.

Statute Law

Statute law is that code of rules laid down in Acts of Parliament passed by our legislature with the object of codifying, amending, or nullifying the rules of law created by the judges of courts of law.

Reference is made to reports of particular "leading cases" which have established or affirmed principles of common law or equity, and to particular statutes which contain rules created by the legislature. Extracts from these cases and statutes are given in the Appendices.

Definition of Contract

A contract is, broadly speaking, an agreement between two or more parties creating obligations which are *enforceable at law*, so that if one party (the defendant) commits a breach of the contract, the law will assist the other party or parties (the plaintiff) by granting one of the following remedies or orders which the court of law will enforce by its judiciary powers—

1. **Damages.** That the defendant shall pay a certain sum by way of compensation for the breach of contract.
2. **Specific Performance.** That the defendant shall carry out the contract.
3. **Injunction.** That the defendant shall cease or refrain from an actual or contemplated breach of contract.
4. **Cancellation.** That the contract shall be set aside.
5. **Rectification.** That the terms of the contract shall be altered so as to express the correct intention of the parties.

Agreement

Bearing in mind the above definition, it is necessary to understand what is meant by "agreement." Agreement is the result of reciprocal promises by the parties to the contract by means of which obligations are created, and is comprised of offer and acceptance. One party promises to do or forbear from doing a certain act if another party will do or forbear from doing some other act (the "offer"); the expression by the other party of his willingness to agree to the terms contained in the offer is the "acceptance"; e.g. A promises to sell B a horse if B will pay him £10, and B agrees; the obligation of A is to deliver the horse to B, that of B to pay £10 to A. If the agreement creating these reciprocal obligations is one which the law will enforce, it becomes a contract.

Quasi Contracts

There are certain obligations, however, which do not spring from agreement, but are yet endowed with the legal attributes of contract, e.g. a judgment order by a court of competent jurisdiction, the right to a return of money paid under a mistake of fact, and the right of subrogation.

Classification of Contracts

Contracts are divided into two classes—

1. **Formal,** consisting of contracts of record and contracts under seal (deeds). Such contracts depend for their validity upon the "form" in which they are made.

2. **Simple,** consisting of contracts which depend for their validity not upon their form, but upon the existence of "consideration." Even though valid, certain of these contracts are not enforceable at law unless the terms thereof are evidenced by writing; in the absence of writing, however, equity will in certain instances (e.g. part-performance) provide a remedy within its jurisdiction (e.g. specific performance).

Elements of a Contract

In order to be valid contracts, the following elements are necessary—

1. Form or, alternatively, consideration.

2. Legality—the act to be done by one of the parties must not be against the law.

In the absence of one of the above two elements, the contract may be—

(*a*) *Unenforceable*—valid, i.e. of legal effect, but without legal remedy by reason of some technical defect; e.g. a contract for the sale of land not evidenced by writing.

(*b*) *Voidable*—one of the parties may be able to repudiate it at his option; e.g. a contract in which there is a misrepresentation of facts by one of the parties.

(*c*) *Void*—of no legal effect and without legal remedy except in special circumstances, e.g. a contract for the loan of money to an infant is void *ab initio*; a voidable contract becomes void after repudiation; a cheque given without "consideration" (q.v.) is a void contract, but the holder in due course of such a cheque could enforce payment whether or not he knew of the absence of consideration.

(*d*) *Illegal*—of the same nature as void contracts, e.g. a contract to commit a crime; but a cheque given for such a purpose could not be enforced by a holder in due course if he knew of the "consideration."

To term a contract "void" is only a convenient way of expressing that there is no contract. The term is often loosely used when correctly the expression should be unenforceable or voidable. A contract of insurance "voidable" by the insurers, by reason of breach of good faith, may become valid if the insurers waive the breach—if the contract was "void,' no waiver would revive it.

Offer, Acceptance, and Consideration

Offer and acceptance from which arise the bilateral obligations of a contract involve of necessity at least two parties. For simplicity the position will be dealt with as between two parties. It is to be borne in mind, however, that either the offeror or the acceptor, or both, may be one or more persons or a corporation. A corporation denotes a legal entity composed of a body of individuals carrying on its affairs

by means of agents, e.g. corporations or companies created by charter or statute, or under the Companies Acts.

Both offer and acceptance, with certain exceptions, may be oral, or in writing, or by conduct. As an instance of conduct, the nod of a buyer at an auction can be an offer, the striking of the auctioneer's hammer an acceptance.

Offer and acceptance have been indicated to be reciprocal promises by the parties to the contract to do or forbear from doing certain acts. In certain instances the actual doing of an act makes the acceptance, e.g. if a reward is offered for the return of a lost article, the act of a person who in response to the offer returns the article creates the contract, i.e. renders the offeror liable to fulfil his promise.

The act or promise of each party to a contract is known as the "consideration." An act is sometimes termed "executed" consideration, a promise being known as "executory" consideration. Much difficulty will be avoided in the law of insurance by recognizing that the insured's consideration, viz., the premium, may be executory, unless otherwise stipulated.

Offer

Communication. There are certain rules to be known in connection with the offer. In the first place, no offer results until it is communicated to the offeree; an offer of a reward for information as to stolen goods could not be claimed by a person who was ignorant of the reward before he gave the information.

Lapse. The offer is not binding until acceptance and, if withdrawn before acceptance, ceases to be an offer. In the absence of withdrawal, an offer remains open during the time stipulated by the offeror or, if no time is stipulated, for a time which is reasonable having regard to the nature of the transaction. It will lapse, however, in the event of the death of either party before acceptance.

Option. A promise that an offer shall not be revocable within a certain time, viz., an "option," is not binding unless the person offering the option receives "consideration" for it. In the absence of consideration, the option is no more than an offer and remains open until revoked.

Revocation. Revocation of an offer, to be effective, must be communicated to the offeree, and it is not so communicated unless and until it is brought to the knowledge of the offeree. In the case of revocation by post, the time of receipt of the letter, not the time of posting, is the test. (In respect of postal communication, compare "acceptance.") If acceptance is given before the letter of revocation is received, or before revocation otherwise becomes known to the offeree, the contract is made and the revocation is inoperative.

General Offer. An offer to be capable of acceptance, need not be made to a specific person. A general offer of a reward advertised to the public at large for information as to stolen goods can be accepted by any person (except perhaps a police officer in the course of his duties) who, acting on the offer, obtains and supplies the information. It does not follow, however, that each person who acts on a general

offer is entitled to the reward, if it is clearly the intention of the offeror to pay it only to the first person to supply the information. A general offer would, if so intended, be capable of acceptance by more than one person, e.g. in the *Carbolic Smoke Ball* case (see below) the reward would have become payable to each and every person, who, after using the smoke balls as directed, had contracted influenza.

General Invitation. On the other hand, a general offer must be distinguished from a general invitation to do business. The latter is merely an invitation to entertain offers. Thus the publication of prices of goods in a shopkeeper's catalogue is an invitation for orders for those goods. If by reason of a number of persons ordering the goods the shopkeeper cannot supply all of them, he is under no contractual liability to those whom he disappoints. Likewise a prospectus of insurance setting forth the cover granted and premiums charged is not a general offer, but an invitation to entertain offers (i.e. proposals).

ACCEPTANCE

Acceptance is necessary to turn an offer into a contract, and, as previously stated, acceptance may be by words, in writing, or by conduct. The mere fact that A does something for B, e.g. digs his garden, does not raise a legal obligation on B to pay for the work. Nor would a mere inquiry by B as to whether A was willing to do the work be sufficient; it must be shown that B clearly requested or agreed that the work be done. Agreement, however, might be implied from the conduct of B in knowingly suffering the work to be done.

Communication. As distinct from the principle relating to an offer, it is not always essential that acceptance should be communicated to the offeror. In *Carlill* v. *Carbolic Smoke Ball Co.* (1892), the defendants offered by advertisement to pay £100 to any person contracting influenza after having used the carbolic ball for a fortnight. Mrs. Carlill used the smoke ball as directed, but afterwards contracted influenza. She was held legally entitled to the payment of the sum offered. The principle to be drawn is that communication is not essential if some other method of acceptance is implied by the terms of the offer. It is sufficient that the offeree acts on the offer. This principle imbues with contractual element such matters as coupon insurance and advertised offers of rewards for stolen property. It is open, however, to the offeror in such cases to make a stipulation that acceptance is to be shown in a certain way or is to be communicated to the offeror. Thus signature to a coupon by the acceptor or the dispatch of a signed coupon to the offeror may be specified, in which case there is no valid acceptance until the acceptor has acted accordingly.

Communication by Post. In the case of an offer which does not dispense with communication of acceptance to the offeror, the validity of the contract, unless otherwise stipulated, does not always depend upon such communication being actually received by the offeror. Where an offer is such that the normal mode of acceptance would be by post, acceptance is good and, therefore, the contract is made when the acceptor puts his letter into the post. The fact that the letter is

delayed in the post does not relieve the offeror; if the offeror, a few days before he received the delayed letter of acceptance, had written to withdraw the offer, the withdrawal is too late if it was not communicated to the offeree before the latter signified acceptance by posting his letter. It has even been held that the principle that acceptance operates from the time of posting applies where the letter of acceptance is lost in the post. The onus is, therefore, on the offeror to stipulate in his offer the mode of acceptance if he wishes to avoid the operation of the principle, e.g. he could make it a condition that the contract is not complete until acceptance in writing is actually received by him. If a mode of acceptance is merely suggested, then acceptance by another method would be valid (e.g. by telegram or messenger when a letter would be the normal method) provided it involved no delay, though it might be necessary for the acceptor to ensure that his acceptance is received.

Qualified Acceptance. Acceptance of an offer must be absolute in order to constitute valid acceptance; that is to say, it must not leave any doubt that the offer is accepted on the terms on which it is made. If acceptance is given subject to certain conditions made by the acceptor, it is not valid acceptance, but constitutes a counter-offer, and the parties change places, the original offeree becoming an offeror. This change of places may occur several times before a contract is finally made, i.e. before acceptance is given unconditionally to the terms of an offer. When a counter-offer is made, the original offer is dead and cannot be accepted unless renewed; thus, if a premium of £10 is quoted for an insurance, and the proposer says he is willing to pay only £9, he cannot afterwards bind the insurer by paying £10, unless the insurer renews the offer; but a mere inquiry by the proposer as to whether the premium could be reduced would not be a refusal of the quotation.

General Offer and Acceptance. Offer and acceptance may sometimes either or both be made in general terms, in which case the creation of a contract depends upon whether reference is made clearly to terms in existence or merely such as are in contemplation. Thus an offer to purchase land on the terms stated in the auctioneer's catalogue and an acceptance subject to such terms would constitute a contract; but an offer to purchase subject to terms to be agreed with the parties' solicitors would not, if accepted, complete the contract, but merely constitute negotiations thereto.

(2) FORMAL AND SIMPLE CONTRACTS

FORMAL CONTRACTS

Formal contracts do not derive their validity from, nor do they necessarily contain, the attributes of offer, acceptance, and consideration which have been indicated broadly as the constituent parts of a contract. A formal contract is frequently an obligation imposed on, or assumed by, a person and dependent for its legal consequences upon its "form" alone.

Contracts of Record. The first class of formal contract is known as

a contract of record. These are obligations imposed on the individual by the judicature, and consist of judgment and recognizance. A *judgment* of a court of record obtained as a result of litigation extinguishes the rights of the parties from which it arose, and substitutes an *obligation*, e.g. that the unsuccessful litigant shall pay a certain sum of money. If judgment is final, the terms of the obligation cannot be disputed, and the judgment creditor thereunder enjoys certain advantages over an ordinary creditor, viz., the assistance of the court in enforcing the judgment. A *recognizance* is in form a contract made with the State in its judicial capacity. It is an undertaking in writing acknowledged before the court by the party upon whom the obligation is imposed, and enrolled in the records of the court. Its usual form is a promise to keep the peace or to be of good behaviour for a certain period, or to appear at the assizes on a certain date, failing which penalties will be levied upon the property or person of the promisor.

Contracts under Seal. The second class of formal contract is the contract under seal, known frequently as a *deed*. A *deed poll*, i.e. a deed made by one party, is not a contract, e.g. a change of name by deed. A deed made between two or more parties is known as an *indenture*. A deed must be in writing or in print, and is made conclusive by being "signed, sealed and delivered." *Delivery* is the execution of the deed with the intention that it shall become an operative legal instrument simultaneously with its execution. The signatory signs his name, places his finger on the seal, and says "I deliver this as my act and deed," thus indicating his intention to "deliver," i.e. to give operation to the deed. An *escrow* is a deed executed subject to a condition being performed, and does not become operative until such performance; e.g. a deed executed for the sale of property and handed to the solicitor but not to be *delivered* until the purchase money is paid.

CONSIDERATION NOT ESSENTIAL. A contract under seal has certain advantages over simple contracts, the chief of which is that consideration is not essential to its validity. As previously stated, its form imbues it with legal force; it is, therefore, the means of giving binding force to promises of gifts, or to contracts made for moral obligations or charitable motives. It is often stated that "a deed imports consideration"; such a statement is not strictly accurate, as the doctrine of consideration in relation to contract is historically of later growth than form. Moreover, the absence of consideration does in certain circumstances affect the enforcement of a deed or provide evidence of fraud or undue influence, of which the court will take cognizance.

ESTOPPEL. Another advantage is that the rule of estoppel applies to the statements and recitals in a deed; estoppel is a rule which prevents (estops) a man from calling evidence to dispute the truth of the statements which he has made.

Bonds. A bond is a contract under seal constituting a gratuitous promise to pay a sum of money contingently upon the failure of certain conditions named in the bond, e.g. an undertaking by a guarantor to pay if a certain person fails to fulfil certain pecuniary or other undertakings owed to the person guaranteed.

Simple Contracts

Simple contracts, as previously stated, depend for their validity upon consideration, i.e. the act or promise of one party in relation to the act or promise of the other party to the contract. The only exception arises in connection with dealings with negotiable instruments, such as bills of exchange and promissory notes, e.g. a holder for value can enforce a bill against the acceptor, notwithstanding the fact that no consideration passed from the drawer to the acceptor.

Consideration. Consideration must be "valuable" in the eyes of the law; that is to say, something which is capable of pecuniary assessment, whether it be a payment, or promise of payment, of money, or the gift or promise of some right or benefit to another party, or promise to do or forbear from doing some act in relation to another party.

Adequacy. Whether the consideration constituted by the offer is adequate to the consideration constituted by the acceptance, or vice versa, is a matter between the parties and not one to be adjudged in the court, though gross inadequacy might act as corroborative evidence when a party seeks to upset a contract on the grounds of fraud.

Legal. Consideration must be legal, e.g. a promise to act against the law would not support a contract.

Present or Future. It must be present or future, not past; e.g. a benefit accorded by one party to another in the past would not form valid consideration to a contract made in the future between the parties.

An exception to this latter rule which might be mentioned, however, is that the liability for a debt barred by the Limitation Act owing to lapse of time is revived against the debtor by his written acknowledgment of the debt or a part payment thereof; that is to say, the revival is an enforceable contract, notwithstanding that the creditor's original consideration no longer gives him any right of action for the debt.

Parol Contracts

Simple contracts, with certain exceptions, do not need to be in writing and are just as effective if made by word of mouth. In the excepted cases, written evidence of the terms of a parol contract and of the parties concerned in it is necessary when one party seeks to enforce the contract against the other; in other words, certain parol contracts though valid may, through lack of written evidence, be unenforceable at law.

Contracts in Writing

Amongst simple contracts in connection with which writing is necessary may be mentioned—

1. **Bills of Exchange and Promissory Notes.** The acceptance of a bill of exchange must also be in writing. (Bills of Exchange Act, 1882.)
2. **Contracts of Marine Insurance.** These must be in the form of

a policy. Other contracts of insurance, except perhaps fidelity and solvency insurance, may be oral. (*Murfitt* v. "*Royal.*")

3. **Contracts set forth in Section 4 of the Statute of Frauds, 1677,** amongst which are included—

(*a*) Any special promise to answer for the debt, default, or miscarriage of another person (i.e. guarantee or suretyship).

(*b*) Any agreement not to be performed within one year from the making thereof.

In such contracts the agreement or some note thereof in writing, signed by the person to be charged therewith (i.e. sued) or some person lawfully authorized by him, must be produced in evidence.

4. **Contracts for the Sale of Goods worth £10 or more** (Sale of Goods Act, 1893); certain acts, e.g. acceptance of the goods or part-payment, dispense with the necessity for evidence in writing.

PERIODS OF LIMITATION

All contracts are subject to limitation periods within which rights of action or arbitration thereunder can be enforced. The Limitation Act, 1939, which consolidates and amends the law relating thereto, maintains the period of six years which previously applied in the case of simple contracts, but reduces from twenty to twelve years the period for contracts under seal. The period for enforcing a judgment debt is twelve years; for the interest on a judgment debt six years. The period in the Public Authorities Protection Act, 1893, within which proceedings may be brought against a public authority or its servants is increased by the Limitation Act from six months to one year. Special provision is made as regards the period of limitation applicable to a person under a legal disability (e.g. infancy, lunacy).

(3) CAPACITY TO CONTRACT

It has been shown that to make a contract it is necessary for the parties to form, by means of offer and acceptance, an agreement which the law will uphold by reason of either its form or the existence of consideration. It has been briefly indicated, however, that such a contract may be void or voidable by reason of the incapacity of one or both of the parties to contract.

The term "incapacity" is used in the sense that, whereas between two parties of full legal capacity a contract would be enforceable, the same contract (though not necessarily all contracts) could be set aside if one or other of the parties thereto is affected by contractual disability. Incapacity may arise by reason of the following—

1. Minority.
2. Lunacy or drunkenness.
3. Corporate existence.
4. Alienage or profession.

MINORITY

Certain contracts with infants (persons under 21 years of age) are void, and, therefore, unenforceable by either party; others are valid and, therefore, enforceable by or against the infant; others are voidable at the option of the infant.

Contracts of the last class, notwithstanding that he can repudiate them, are enforceable by the infant if he has not so repudiated, but only for damages; he cannot obtain specific performance, as such a remedy is not mutual. Specific performance is an equitable remedy and to "obtain equity" a person must "do equity"—or rather be under the necessity of doing it.

Common Law as Affected by Statute. The common law as regards infants has been altered by certain statutes, and the comparative position is briefly as follows—

COMMON LAW. (1) *Valid.* Contracts for *necessaries* and, if reasonable, certain contracts for the infant's benefit (e.g. for service or apprenticeship.)

(2) *Voidable.* All others, with the qualification, however, that—

(*a*) Contracts continuous in their operation *were* binding on the infant, unless he repudiated them either during infancy or within a reasonable time after attaining his majority (e.g. obligations arising out of the ownership or occupation of permanent property; and contracts to which continuous benefits and liabilities attach, such as shareholdings or partnerships).

(*b*) Contracts not continuous in their operation were not binding on the infant *unless* he affirmed them within a reasonable time after attaining his majority, e.g. contracts for money lent or for the supply of articles other than necessaries or for work done.

INFANTS' RELIEF ACT, 1874. (1) *Void.* Contracts for money lent or to be lent, for goods supplied or to be supplied (other than necessaries); and accounts stated. Also, contracts which at common law were not binding unless affirmed by the infant after majority, viz., class 2 (*b*) above.

(2) *Valid.* Contracts valid at common law, i.e. for necessaries and infant's benefit.

(3) *Voidable.* Contracts which at common law were binding on the infant, unless repudiated during infancy or within a reasonable time after majority, viz., class 2 (*a*) above.

Sale of Goods Act, 1893, enacts that where necessaries are sold and delivered to an infant, he must pay a *reasonable* price therefor; necessaries meaning goods suitable to the condition in life of such an infant and to his actual requirements at the time of such sale or delivery.

In connection with a contract with an infant, the law will not allow the other party to bring any civil proceedings which would serve to overthrow the intentions of the Infants' Relief Act. Thus an action in tort for damages for fraudulent misrepresentation would fail, even though the infant had falsely represented himself to be of full age; so also would an action in tort, which could alternatively be framed as an action for breach of contract, e.g. for negligence in over-riding a horse which the infant had hired to ride. On the other hand, an infant cannot recover money paid under a contract from which he has taken the benefit, e.g. a purchase or hire for cash of goods of which he takes the use, even though they be not necessaries.

Reasonable Price. The Sale of Goods Act in effect takes away the creditor's remedy to sue the infant for the contract price of "necessaries" supplied to the infant and substitutes a right to sue for a reasonable price; that is to say, it places on the plaintiff the onus of showing that the amount claimed represents a fair price for the goods.

Necessaries. In considering the term "necessaries," the circumstances in life of the infant and his reasonable requirements at the time of sale and delivery will be taken into account; thus a supply of gold cuff-links might be necessaries for an undergraduate, but not for an errand boy; and the supply of a suit of clothing to an undergraduate might be necessaries, whereas the fulfilment of an order for six suits at one time might be beyond his actual requirements and, therefore, not necessaries.

The tradesman must take the risk of any mistaken belief as to the actual circumstances in life of the infant, even though the latter falsely conveys a wrong impression.

In cases of fraud in which money is lent or goods which are not necessaries are obtained by an infant, the lender or trader may be able by action to obtain an order for restitution of the money or goods, but this is an empty consolation if the money has been spent or the goods consumed.

Lunacy or Drunkenness

A contract made whilst a party was insane or drunk is voidable by the lunatic or drunken person; but a lunatic, even though certified to be insane, or a drunkard, is not incapable of contracting. To avoid the contract, it must be proved on behalf of the lunatic or drunkard that at the time of the contract he did not know what he was doing, and that the other party knew or should have known of his condition; moreover, the drunkard who affirms his contract upon recovery of normal condition cannot subsequently repent and plead drunkenness in order to avoid it.

The Sale of Goods Act, 1893, puts lunatics and drunkards on the same footing as infants as regards necessaries sold and delivered, i.e. they become responsible to pay a reasonable—not necessarily the contractual—price.

Corporations

A corporation is a legal entity, but as it is not a human existence, it can contract only through its agents, viz., the persons who are appointed to manage, control, and carry out the work of the corporation.

The general rule which governs the method by which a corporation makes a contract is that it can be bound only by contracts under seal, but upon this general rule have been grafted so many exceptions that the rule itself becomes of somewhat infrequent importance and effect.

Contracts of Daily Routine. Simple contracts are quite sufficient for matters of trifling importance or of daily routine, or, in the case of

trading corporations, matters which relate to the objects and purposes for which they were formed.

Companies Act, 1948. The affairs of the vast majority of trading corporations are regulated by the provisions of the Companies Act, 1948, which enables a company incorporated under the Act, or a former Companies Act, to contract through its authorized agents by the same methods as a private person, i.e. orally, in writing, or by deed.

Contracts Ultra Vires. The capacity of a corporation to contract is governed by the terms of its incorporation; contracts which are outside its capacity are said to be *ultra vires*, and are void.

A corporation created by royal charter is limited in its operations by contracts consistent with the objects of its creation, as directed by the charter.

The powers and limitations of corporations which have been created by statute must be deduced from the terms of the statute.

As regards a company incorporated under the Companies Act, its objects must be set forth in its Memorandum of Association when formed, and this limits and defines the powers of the company; there is power, however, under the Act for such a company to alter its Memorandum by complying with certain requirements.

Aliens

An alien cannot acquire property in a British ship. Beyond that he has the same contractual capacity as a British subject, and, therefore, by acquiring all the shares, he may own a British shipping company. Severe restrictions, however, in time of war, may be imposed by statute, or arise from the common law respecting the capacity of alien enemies to contract or to enforce contracts.

Judicial Immunity. Foreign sovereigns, their ambassadors, and the officials and household of such ambassadors are immune from the jurisdiction of the English courts. Whilst, therefore, having full capacity to contract and to enforce such contracts, they cannot on their part be sued unless they voluntarily agree to submit to the jurisdiction of the Court.

Professional Incapacity

A barrister cannot sue for fees for his professional services; a solicitor, however, having paid such fees, can recover them from the client.

The Royal College of Physicians, by its by-laws made under the Medical Acts, renders its Fellows unable to sue for their fees. Physicians, otherwise, are not under any disability.

Married Women

Prior to the Married Women's Property Acts, the general rule, to which there were certain exceptions, was that a contract with a married woman was void.

Common Law. In the case of these exceptions, there were various circumstances by which such a contract could or could not be enforced by the wife or husband jointly or individually, or upon which they

could or could not be sued either severally or jointly. The rule and its exceptions arose from the fact that at common law the property of the wife vested in the husband.

Statutes. The Married Women's Property Act, 1882, repealing previous statutes of 1870 and 1874, placed a married woman in the position of a *feme sole* as regards her separate property, whether acquired before or after marriage, so that she could make contracts and sue or be sued alone thereon in respect of, and to the extent of, such property.

The Married Women's Property Act of 1893 extended her liability under contract so as to bind separate estate, whether it existed at the making of the contract or was after acquired. An exception, however, was made as to property which had been settled on a woman "subject to a restraint on anticipation."

The Law Reform (Married Women and Tortfeasors) Act, 1935, renders void any restraint on anticipation of property by a married woman contained in a settlement executed after 1st January, 1936, which could not be attached to the enjoyment of that property by a man.

Husband. The position of the husband since these statutes is that he can only be liable if the wife was acting as his agent or was contracting for the supply of "necessaries"; e.g. clothing suitable to her station in life or food. A contract for "necessaries" is a quasi-contract with the husband, i.e. his wife is deemed to be an "agent of necessity." If the creditor can persuade the court that a wife was the husband's agent, it makes no difference if the creditor gave her credit believing she was single.

(4) CONSENSUS

The source of a contract is an agreement, and in the foregoing have been described the elements with which an agreement must be accompanied in order that a contract may be made. An agreement is a consent ordinarily resulting from intention on the part of at least two persons in relation to each other; sometimes referred to as *consensus ad idem;* in certain circumstances there may be intention without consent, or consent without intention, or an absence of both consent and intention, on the part of one of the parties, resulting in the expression of an apparent agreement; and, if such agreement is clothed with form and consideration whereby a contract is made, it has to be determined whether the contract should be enforceable, and, if so, with what modification, if any; or whether it is void or should be voidable—in other words, which party should suffer.

Absence of intention or consent may arise from mistake, innocent representation, fraud, duress, or undue influence. It does not necessarily follow that owing to one of these factors the contract is void; it may be that it still remains enforceable by at least one of the parties.

In relation to law of contracts of insurance, matters affecting consensus are more fully dealt with in later chapters of this book, but a brief reference thereto in connection with contracts generally might be made at this stage.

Mistake

Under the heading of mistake it is not intended to refer to mistakes of expression. If errors which should be obvious to both parties occur in setting forth the terms of the contract, the courts have power to rectify the contract.

Mistake of person, of subject-matter, or possibly of the nature of the contract, may be sufficient to render a contract void; but mistaken judgment as to the advantage of the contract, or of ability to perform it, will not affect its validity.

Mistake of person may arise where A contracting with C believes him to be B; it cannot arise where the identity of B is a matter of indifference, e.g. ready money sales by A. Suppose, however, that Jones has been accustomed to buying goods from Smith, and Robinson takes over Smith's business; Jones sends a further order, which Robinson supplies without disclosing that the business had changed hands. Jones is entitled to refuse payment and return the goods; the contract is void, as Jones did not contemplate making it with Robinson.

Mistake of subject-matter might arise where there are two articles of the same kind, e.g. two bales of goods A makes an offer which B accepts; if it can be established that without negligence each party's mind was directed to different articles, no contract is made. Again, the goods might have ceased to exist; thus a haystack might be sold, that unknown to both parties had been burnt down before the transaction; again no contract results. A contract can, however, be validly made on goods where each party contemplates their failure to exist and the risk of non-existence is taken into account, e.g. marine policies on goods "lost or not lost."

Mistake as to the nature of the contract can seldom be a ground for avoidance, as in the absence of fraud the mistake may simply be due to negligence, and the latter is not a sufficient excuse; but occasionally such a contract may be avoided, as where a blind man is induced to sign a guarantee on the assurance of an interested third party that he is merely appending his name as a witness to the document.

Innocent Misrepresentation

It is necessary carefully to distinguish innocent misrepresentation from non-disclosure; the latter only affects contracts *uberrimae fidei* (of the utmost good faith).

Ordinary contracts are governed by the rule *caveat emptor*—the vendor is not called upon to disclose all he knows about the goods which he proposes to sell. If, however, the facts upon which he does make representations are untrue, or, if he suppresses so much that what he states is positively misleading (*suppressio veri, suggestio falsi*), then the enforcement of the contract may be affected.

Representations. In this connection, expressions of opinions are not "representations." To be a representation, it must be shown that the vendor not merely says he thinks the goods are of a certain nature or quality, but that he definitely declares they are or shall be.

Distinguished from Fraud. Innocent misrepresentations must also be distinguished from wilful misrepresentations, i.e. fraud. The former are untrue statements made by a person who honestly believes them to be true, and whose failure to know of their falsity was not due to deceit, or recklessness as to whether the statements were true or false. (*Derry* v. *Peek.*)

Two Classes of Innocent Misrepresentations. There are two classes of such representations, viz.—

1. Statements of fact which are embodied in the contract itself.
2. Statements of fact which are not so embodied, but are made with a view to inducing a person to enter into a contract.

On the class which is affected depends the position of the injured person who seeks to avoid the contract or to obtain a remedy.

When the statement of fact is embodied in the contract itself, it becomes legally a condition or a warranty. (*M.M.I.* v. *Hunt.*) In the contract the description of a representation as a "condition" or a "warranty," or otherwise, does not decide its nature; the terms are very loosely used, e.g. in insurance contracts the term "warranty" is often used for a representation which is legally a condition; and it is for the courts to determine whether the representation is a "condition" or a "warranty."

Condition. A condition is a vital term which goes to the root of the contract and which entitles the party who suffers to declare the whole contract void, or to avoid it for the particular matter which the breach of condition affects (e.g. a particular claim under a policy of insurance).

Warranty. A warranty is an independent term which does not go to the root of the contract and so make it voidable, but entitles the party who suffers to damages. It should be noted that under the Sale of Goods Act, 1893, certain warranties are implied in a contract for the sale of goods unless specifically excluded.

The second class of representations, viz., those which are made during the negotiations to induce a person to contract, but not embodied in the contract, do not affect the validity of the contract itself. The person who suffers, therefore, has no remedy *at common law* for damages if the representations, though innocent, prove to be untrue. (*M.M.I.* v. *Hunt.*) *If something has been done or has occurred in furtherance of the contract,* each party can hold the other to the contract.

An example might be taken where an insurance company accepts the insurance of a motor-car on the owner's assurance in good faith that the vehicle is in "good running order." An accident occurs in which it is discovered that the cause was a serious defect in the steering. The innocent misrepresentation of the owner by itself does not absolve the company, who must meet their liability and have no redress. The fact that the car is described in the policy as in good running order might make the representation a warranty which entitled the company to damages, though the application of such a remedy is of doubtful efficacy where insurance contracts are concerned. If, however, the truth of the representation is made a condition of the insurance, e.g. where it is stipulated in the policy that the actual truth of the statements in

the proposal is a condition precedent to liability, the fault entitles the company to repudiate liability.

In this case it will be noted that something had occurred in furtherance of the contract, viz., an accident giving rise to a claim under the policy.

Remedy in Equity. The law (i.e. the law of equity) will provide a remedy for the second class of representations if the injured party acts promptly and the parties can be restored in *status quo,* i.e. if *nothing has been done in furtherance of the contract.*

Thus the injured party may sue for rescission of the contract, and the court will, on proof of the misrepresentation, set the contract aside unless anything has been done which cannot be undone; e.g. if a man purchases a business the takings of which are untruthfully represented, and pays the purchase price, the court will declare the contract void and order return of the purchase money, provided he has not entered into the business.

The court will also refuse specific performance of a contract procured by misrepresentation, e.g. if a person leases a house which he is assured by the lessor is free from damp, and before occupation he finds it is in a damp condition, the lessee can, provided he acts promptly, refuse to occupy, and the court will not assist the lessor in obtaining performance of the lease.

Exceptions as to Damages. There are certain exceptions from the rule that no damages can be obtained for innocent misrepresentation. The only one which need be noted for purposes of insurance law is warranty of authority by an agent. If an agent in good faith claims an authority which does not exist and thereby induces another person to contract through him, a remedy lies against the agent for damages.

NON-DISCLOSURE

This has been briefly referred to previously, and its effect on contracts of insurance is described later. Its application arises in contracts where one party has, or is presumed to have, knowledge which is not accessible to the other, and is, therefore, under a duty to disclose all facts which would reasonably assist the judgment of the other in entering into the contract. Its importance is that even innocent failure to disclose material facts may vitiate the contract. Certain other contracts, such as suretyship, partnership, and the sale of shares, are affected to a certain extent by the factor of non-disclosure, but it is only in insurance that the duty of disclosure can be said to be absolute.

FRAUD

Fraud or wilful misrepresentation in contract is an untrue statement made by a person who knows it to be false, or who makes it recklessly without knowledge as to whether it is true or false, with the purpose that it should be accepted and should thus induce another person to enter into a contract. (*Derry* v. *Peek.*)

To affect the contract, the representation must actually deceive the other person, and thereby lead him to contract.

It must also be an active attempt to deceive, and, therefore, mere non-disclosure, i.e. passive deceit, would not constitute fraud. A man who offers a horse for sale is not bound to disclose its defects, and if a purchaser buys it without inquiry as to its faults, or stipulation as to the purposes for which he requires it, he cannot afterwards complain of his transaction if the horse is unsound or unsatisfactory; the doctrine of *caveat emptor* applies. If, however, the vendor represents the horse to be sound in wind and limb, well knowing his representation is untrue, with a view to inducing the purchaser to buy, the transaction is fraudulent.

Suppressio veri suggestio falsi. Fraud, however, would include a statement which, though true, was in the making of it intentionally designed to convey a false impression by reason of the suppression of other facts. Thus a person who desires to insure with company C admits that company A has asked for onerous terms, but omits to mention that company B has declined to renew a previous insurance. If the circumstances are such that the admission of fact as to company A tends to conceal a wilful suppression of fact as to company B, the passive deceit is such as to constitute fraud, even were the contract not impeachable by reason of the special duty of good faith which applies to contracts of insurance.

Reckless Statements. If a person makes a false statement honestly believing it to be true, it will not give rise to any question of fraud, even though there be want of care in ensuring the truth of the statement; it must be proved that there was some wilful carelessness in the statement such as to show that the person making it had no regard for its truth or reason for believing it to be true. (*Derry* v. *Peek.*)

Representations of Fact, not Opinion. Moreover, to be fraudulent it is also necessary that the untrue statement be a representation of fact, e.g. "I (the vendor) gave £20 for the horse myself" is a statement of fact, which, if untrue to the knowledge of the vendor, would be fraudulent; "I think that the horse is honestly worth £20" is an expression of opinion, not of fact, and would not be a sufficient ground on which to raise the question of fraud. The distinction to be drawn is between a representation of fact and an expression of opinion.

Remedy at Common Law. Fraud is distinct from innocent misrepresentation in that the person who is defrauded has a right in tort to damages, as well as his contractual rights.

For an innocent misrepresentation, the rights of the person deceived only arise from the contract and, as already described, he may or may not have a remedy.

The contractual position in the event of fraud depends on the circumstances; a valid contract has been made even though consensus is induced by fraud, and the contract does not become void, but is voidable by the person defrauded. He must, however, act without delay by repudiating the contract as soon as he becomes aware of the fraud, viz., by refusing performance of his part of the contract or by declaring the contract void by reason of the fraud. Delay might prejudice him,

as the absence of action on learning of the fraud might be taken as evidence of an intention to affirm the contract.

In certain circumstances, a repudiation will not avail him, e.g. if a person has purchased goods from a vendor by false pretences and sold them to an innocent purchaser, the vendor cannot reclaim the goods, but is left to his remedy in tort against the fraudulent purchaser. The reason for this is that the ownership of the goods has passed to the innocent purchaser; the position is different where goods have been stolen by a trick, as in such case ownership of the goods still remains with the original vendor.

If the person defrauded prefers to enforce the contract, he may do so and sue under the contract for the loss arising from the fraud; thus if he has purchased goods he may retain them and seek damages.

Duress

A contract entered into under duress, viz., violence or imprisonment or threats thereof, is voidable, but the person affected by the duress must be the party to the contract or his wife, parent, or child; the person contracting cannot avoid his contract by reason that he was induced to make it on account of duress inflicted on some person other than himself or the near relatives indicated.

Duress of a third person is not, however, valid consideration for a contract, and it may be, therefore, that such a contract would be void for lack of consideration.

Undue Influence

Undue influence is a factor in equity on which it may be possible to set aside a contract. It is a question of fact which from the nature of the contract and the parties involved gives rise to a presumption of duress, though duress cannot be definitely established. It arises where one party to the contract is in the position of being unfairly treated by the other, viz., where one party is an ignorant or inexperienced person, or is in desperate need, and thus forced into an unfair bargain.

Gifts, etc. The presumption might arise in the case of a gift, even though made under seal; or where a party contracts for grossly inadequate consideration.

Positions of Trust. Even if the contract is apparently reasonable, undue influence may be presumed where the parties are in a fiduciary relationship, e.g. solicitor and client, doctor and patient, ward and guardian.

Rebuttable Presumption. The effect of undue influence, if the plea is accepted by the court, is that it throws on the party who is presumed to have exercised it the burden of showing that he did not take advantage of his position. If, however, he successfully rebuts the presumption, the contract is valid.

(5) LEGALITY

If the object of a contract is illegal, it is hardly necessary to say that

the law will not countenance or enforce the performance of the illegal object. Illegality in contract, however, extends beyond actual crime, and may be divided into two classes—

1. **Statutory.** Agreements which are illegal by statute. By Act of Parliament the State penalizes or prohibits certain contracts in order to protect the public or the State revenue, or to prevent the abuse of trade or commerce. It does not follow in every case that the agreement is illegal; it may be that a penalty is imposed for its occurrence or continuance, or that it fails to become a valid contract. As affecting the subject of insurance the statutory enactments with regard to wagers are important, bearing in mind that wagers were at one time enforceable at law, and that it is not always easy to distinguish between a contract of wager and a contract of insurance.

2. **Public Policy.** Agreements which have an object which is criminal, wrongful, or against public policy. An agreement to commit a crime or a tort is not enforceable, e.g. to commit murder, or to assault or defraud a third person.

Public policy is a somewhat elastic term, but agreements which fall within it have tended to become fairly clearly established. Amongst them it is important to mention agreements which seek to oust the jurisdiction of the courts.

Arbitration. The condition in insurance contracts that disputes shall be referred to arbitration does not come within the scope of agreements which seek to oust the jurisdiction of the courts, and is, therefore, legally upheld. It is of historical interest, however, that in the early days of the common law the courts viewed a condition of arbitration as against public policy and, therefore, illegal. The later development of the common law, now embodied in statute, served to establish the validity of arbitration as a method of settling disputes.

In order to grasp more readily the application of Principles to Practice, readers are strongly advised, when reading the text, to refer forthwith to the Alphabetical Appendixes when cases and statutes are quoted.

CHAPTER II

THE CONTRACT OF INSURANCE

ELEMENTS of the contract—Good faith—Insurable interest—Insurable events—Contracts of indemnity—Parties to the contract

For Cases and Statutes cited herein, see Appendixes

(1) ELEMENTS OF THE CONTRACT

A CONTRACT of insurance is an agreement between the insurer on the one hand and one or more parties, called the insured, on the other, whereby the insurer undertakes in return for the payment of a certain consideration called the premium to pay to the insured a certain sum of money, or to grant equivalent consideration, on the happening of a specified event.

THE EVENT

The event must be of an uncertain nature, either as to—

(*a*) Time, as in life assurance, where, though the event will happen, the actual date of the event is uncertain.

(*b*) Occurrence, as in fire, marine, and accident insurance, where the event must be fortuitous to the insured and may, therefore, not happen at all.

The event must also be one of which the happening has the character of misfortune to the insured, in the way of affecting his life, health, or limb, or of resulting in pecuniary loss.

OFFER

The elements of a contract of insurance include the elements of any other type of contract, namely, (1) offer; (2) acceptance; and (3) consideration. The general principles of these elements, therefore, apply with equal force in connection with insurance.

Usually the offer proceeds from the proposed insured. The prospectus and proposal form issued by the insurers may set out full particulars of the contract they are prepared to make and the price for the contract; the prospectus, however, is not an offer but merely an invitation to offer. When an alleged offer is made, it is necessary to consider—

(*a*) Whether it is intended as an offer—the correspondence between the parties may show that the completion of the proposal by the proposed insured is merely an inquiry for a quotation, i.e. an invitation to the insurers to make him an offer.

(*b*) Whether it is complete—without the completion of a proposal, the mere expression of a desire to insure would generally require supplementing by precise information from the proposer as to what cover

is desired and from the insurers as to the terms of insurance, and further negotiations between the parties before a contract is made.

PROPOSAL FORM

The majority of accident insurances are made by means of various proposal forms containing questions relating to facts which will enable the insurers to determine the nature and extent of the risk which they are requested to undertake. Generally, it may be taken by the proposed insured that the information sought in the proposal is the full extent of the information required by the insurers, unless they make supplemental requests for information on other points, and the proposed insured is not called upon to volunteer other information if he may reasonably assume from the absence of a question thereon that the insurers do not attach material importance to such information. If, however, it is obvious to any reasonable person that such other information is material it must be disclosed. (*Horne* v. *Poland; Bond* v. "*Commercial Union.*")

The effect of omissions or misrepresentations in the proposal is dealt with hereafter. The proposal is usually made the basis of the contract in most classes of accident insurance, and in that case accuracy is essential (*Joel* v. "*Law Union & Crown*"; *Dawsons, Ltd.* v. *Bonnin;* "*M.M.I.*" v. *Hunt*), as the existence of a question in the proposal raises the presumption that the correct answer is of importance to the insurers in their judgment of the risk. Even the accuracy of the insured's name may have an influence, the courts having held that, in certain circumstances, an alien insuring under an adopted English name is at fault in not giving his original name so as to show that he is an alien. (*Horne* v. *Poland.*)

Some proposal forms contain both the price and the particulars of the insurance offered, in which case the completion and submission of a proposal by the proposed insured generally constitutes an offer by him to insure ("*General Accident*" v. *Cronk*). Others may merely seek such information from the proposed insured as will enable the insurers to make an offer, i.e. to submit the price and particulars of the insurance they are prepared to grant.

ACCEPTANCE

A proposal by the proposed insured to insure in accordance with the terms contained in the prospectus, and an unqualified assent by the insurers to accept the insurance on such terms, completes the requirements of offer and acceptance. ("*General Accident*" v. *Cronk.*)

An inquiry for quotation, however, followed by the insurer's quotation, requires the acceptance thereof by the proposed insured.

A proposal to be insured at the terms contained in the prospectus may be met by an offer from the insurers of special terms; this would constitute a counter-offer for the proposer's consideration and acceptance.

Consideration

The consideration is called the premium. In the usual course of business it is payable in money.

Other forms of valuable consideration agreed between the parties would be equally good, e.g. a cheque, bill of exchange; if dishonoured, however, these instruments would not ordinarily constitute payment. Amongst other forms may be mentioned settlement in account or payment by instalments.

All these other forms of consideration intend eventual monetary payment, but it is useful to notice that in mutual insurance there may be an undertaking by each member to contribute to the general losses sustained, and this undertaking would constitute good consideration.

Coupons

A large measure of personal accident insurance is effected by way of coupons inserted in the daily press, periodicals, diaries, etc. This is perhaps the most popular instance where the offer proceeds from the insurers.

In view of the variations in coupon insurance, it needs consideration as to how acceptance is given, and whence the consideration emanates before it can be determined whether the contract is complete. Three examples might be given—

1. Unconditional, without further payment: where mere compliance with the terms of the offer constitutes acceptance; e.g. if the bearer of a coupon contained in a certain magazine is entitled to compensation if he is killed or injured by an accident to a railway train within a certain period. Carrying the coupon or magazine may constitute acceptance. The consideration is contained within the price paid for the magazine. The important point to be noticed is that by the terms of the offer, the insurers are deemed to waive the usual requirement of a contract that notice of acceptance must be communicated to the offerors. (*Carlill* v. *Carbolic Smoke Ball Co.*)

2. Conditional without further payment: where compliance with some condition is specified in the coupon; e.g. in the same illustration, where signature to the coupon is necessary, acceptance is not complete until the coupon is signed and such signature must precede the event; or where the coupon must be signed and forwarded to the insurers for registration.

3. Conditional with further payment: where compliance with a condition and payment of a premium is required; e.g. in the illustration cited, where the proposed insured must sign and forward the coupon to the insurers with a certain registration fee, acceptance and consideration is constituted by compliance with these requirements.

Temporary Cover

Temporary cover is granted in many classes of accident insurance whilst the negotiations for a policy are in progress, and does not create any obligation to accept the proposal. It is in itself a contract of insurance, and is given either by the insurers or by an agent having express

or implied authority to do so. (*Murfitt* v. "*Royal.*") In some cases it is given by a Cover Note briefly indicating the nature of the protection and its duration; in other cases it may be oral or contained in the correspondence between the parties, and may be indefinite as to duration.

The temporary cover comes to an end when the policy is issued. Unless the period is specifically mentioned the temporary cover will otherwise continue either until it is withdrawn or the proposal is declined, or for a reasonable time having regard to the circumstances and duration of the negotiations for the main insurance.

Whether in enforcing the contract of temporary insurance the insured is bound by the conditions of the policy which would ordinarily have been issued depends either upon whether such conditions are embodied in the temporary cover or upon whether the insured knew or had the opportunity of knowing the conditions and had agreed to be bound by them. (*In re Coleman's Depositories Ltd. and "Life and Health."*)

(2) GOOD FAITH

Chapter I (4), deals with the principles of "consensus," which affect all contracts, including insurance. A contract of insurance is further affected, however, by a special principle known as the duty of *uberrima fides*—the utmost good faith.

The duty is reciprocal, that is, both parties in coming together to contract must give each other every assistance in making a concluded contract. The proposed insured must fully and accurately disclose all facts material to the risk which are known to or ought to be known to him (*Carter* v. *Boehm*); the insurers must give accurate details of the nature and extent of the contract, which they are prepared to make. (*Bradley* v. "*Essex & Suffolk.*") The insurers, moreover, are equally bound with the proposed insured to disclose material facts, e.g. where they know the event cannot happen they cannot contract on it; they cannot insure against fire in respect of a building which they know has been demolished prior to the insurance.

The scope of the duty of the proposed insured to disclose material facts may be defined in the terms of the contract, in which case the implied duty is replaced by an express duty. (*Thomson* v. *Weems.*) It is necessary, however, first to consider the position where the duty of disclosure is not expressly modified, but is inherent in the contract.

MATERIAL FACTS

The materiality of a fact depends on whether at the time of the negotiations the knowledge of that fact by prudent and experienced insurers would have affected their decision to insure, or have influenced the amount of premium or the scope of the cover. (*In re "Universal," Forbes & Co's Claim; Ewer* v. "*National Employers.*")

It has to be determined whether in the opinion of a reasonable man the insured should have regarded the fact as material in these respects. Evidence will, therefore, be heard not only from the insurers, but also from other insurers or skilled persons. The opinion of the insured will carry little weight, and he must rely upon the effect of the

evidence on the minds of reasonable men, viz., an arbitrator, judge, or jury. (*Horne* v. *Poland.*)

The materiality of the fact, moreover, is judged by what would have been its effect on the particular insurance at the time when it should have been disclosed, not by its effect at the time of a particular loss or its bearing on insurance generally. It might be impossible to establish the influence of a fact on a particular loss, it might even be immaterial to the loss, and, notwithstanding, the insurers but for its concealment might never have accepted the risk.

Amongst facts which are material are—

(*a*) Facts which would tend to increase the normal peril of the risk insured against, e.g. in a burglary insurance, the existence of doors communicating to another building; in a personal accident insurance, the omission to state the proposer's occupation accurately. (*Biggar* v. "*Rock Life.*")

(*b*) Facts which infer special motive to insure, e.g. the fact that the sum insured grossly exceeds the value of the property.

(*c*) Facts which tend to show that the proposed insured is a specially hazardous risk, e.g. that he has made previous claims, or has been refused continuance of insurance by other insurers (*re Yager* v. "*Guardian*"), or is an alien of a nationality unfavoured by insurers in general. (*Horne* v. *Poland.*)

BREACH OF DUTY

A breach of the duty of good faith on the part of the proposed insured may be by way of non-disclosure or concealment, or of innocent or fraudulent misrepresentations.

Non-disclosure. Non-disclosure is rather the unintentional omission to mention a material fact, either by inadvertence or because the proposed insured has deemed it to be immaterial. (*Joel* v. "*Law Union & Crown.*")

Concealment. Concealment may be said to be the intentional suppression of a material fact. ("*London*" v. *Mansel.*)

Non-disclosure and concealment are not limited to material facts within the knowledge of the insured, but include facts which he should have known in the ordinary course of his business. At the same time, he is not called upon to disclose facts of common knowledge (e.g. geographical information) or facts which insurers of ordinary skill ought to know (e.g. the ordinarily hazardous nature of the proposer's trade, or matters of law). (*Carter* v. *Boehm.*)

Innocent Misrepresentations. Innocent misrepresentation is where a statement of fact is inaccurate, but where the person making it does so honestly believing it to be true.

Fraudulent Misrepresentations. Fraudulent misrepresentation is where a statement is known by the person making it to be false, or where he does not believe it to be true, or where he made it recklessly without knowledge as to whether it was true or false. (*Derry* v. *Peek.*) The subject of innocent and fraudulent misrepresentations is dealt with in pages 13–18.

Effect of Breach of Duty

The basis of the contract of insurance is that material facts have been disclosed fully and accurately. The effect, therefore, of non-disclosure or concealment, whether innocent or fraudulent, is to render the policy voidable. ("*London*" v. *Mansel; Carter* v. *Boehm.*)

The proposed insured is under a duty to tell the insurers not only what he honestly thinks they should be told, but also what they actually should be told within the scope of material facts. (*Horne* v. *Poland; Carter* v. *Boehm.*) A statement which is untrue, however, would not affect the policy if it does not relate to a material fact, i.e. where it would not influence the decision of the insurers or the terms of the insurance. (*Dawsons* v. *Bonnin.*)

Fraudulent Misrepresentations. Fraudulent misrepresentations of material facts avoid the policy by making the contract unenforceable, as the law will not assist a party to a fraud, either in enforcing a claim or obtaining a return of his premium.

Innocent Misrepresentations. The effect of innocent misrepresentations is not necessarily to render the policy voidable (*Joel* v. "*Law, Union & Crown*"), as it has to be recognized that the insured is not bound to the absolute truth, provided he is honest; even honest misstatements may at times turn out to be untrue, especially statements of intention. Thus, a statement by a proposed insured that he will not engage in motor-cycling would not *per se* invalidate a policy of personal accident insurance if the insured later changes his intention and becomes a motor-cyclist. It would become a fraudulent representation, however, if it could be shown that, at the time of making the statement, it was the insured's intention to become a motor-cyclist. Again, a statement that the proposed insured held no other insurances upon the same risk which, if made intentionally, might amount to fraud, would not affect his right to recover if made innocently (but see "Contractual Good Faith").

On the other hand, an innocent misrepresentation would render the policy voidable where the insured ought to have known of its inaccuracy, as it is to be assumed that he made reasonable efforts to ascertain the information given was accurate.

The Contractual Duty of Good Faith

In most classes of accident insurance, it is usual to find that the proposed insured is required to complete a proposal containing certain questions upon which the insurers estimate their risk, determine the cover which they will grant, and calculate the premium.

In the case of such insurances the inherent duty of good faith is often expressly extended by stipulating that the proposal and the declaration therein (i.e. as to the "truth" of the answers to the questions in the proposal) is to be the basis of the contract; the effect of which is that a contractual duty is added and the policy becomes voidable merely by reason that a statement is untrue, whereas the normal test would be whether the statement is an innocent or fraudulent misrepresentation. (*Dawsons* v. *Bonnin;* "*M.M.I.*" v. *Hunt.*)

The truth of any fact may be made a condition precedent, whether in the opinion of others the fact is material or immaterial, as it is deemed that the insurers would not have made its truth a term of the contract unless accuracy was considered to be material; they are entitled to determine what is material, provided it is clearly laid down in the contract. (*Thomson* v. *Weems; Stebbing* v. "*Liverpool & London & Globe.*")

Moreover, an answer in merely the affirmative or the negative made by the proposer for an insurance policy in answer to a question in the proposal form must be interpreted as representing not merely that he was speaking to the best of his knowledge and belief, but that he knew the fact or facts to be as stated. ("*M.M.I.*" v. *Hunt.*)

On the other hand an accurate answer to a question directed to the present state of affairs does not imply any element of futurity. Thus a question affirmatively answered at the time of proposal as to whether the insured's machinery, plant and ways are in good order and condition does not enable the insurer to refuse a claim on the grounds of the defective condition of the plant at the time of the accident (*Woolfall and Rimmer, Ltd.* v. *Moyle*). Moreover, it would appear that if the question is directed to the future, i.e. "Will the plant, etc., be kept in good order?" an affirmative answer honestly given of the insured's intention to do so would satisfy the test of accuracy notwithstanding a change of circumstances.

In other classes of accident insurance the policy may set forth in its conditions the inherent duty of good faith necessary in insurance. In such case the scope of the inherent duty is unaltered if it is fully and correctly stated by the condition, but the duty itself becomes contractual instead of inherent; that is to say, it is governed by the wording of the condition, and would be affected by any slight deviation or ambiguity of wording. Sometimes a condition may considerably restrict the duty of good faith, as where it is stipulated that the policy will become void in the event of fraud. This has the effect of excluding the application of the inherent duty and of substituting a contractual duty, but the consequent contractual duty is very much less than the inherent duty, in that the proposer is only called upon "not to be fraudulent," and would not suffer merely for non-disclosure.

Duration of the Duty

The duty of good faith continues during the negotiations until acceptance, that is to say, until the contract is complete. (*Yager* v. "*Guardian.*") Any fact or any inaccuracy, therefore, which becomes material in the course of negotiations must be brought to light during the negotiations, as the time at which its materiality is tested is that immediately before the contract is finally effected. After acceptance, the duty ceases, so far as any subsequent material facts or inaccuracies come to the knowledge of the insured, and arises again only when an alteration of the insurance is required, and then only so far as the alteration is concerned. As regards the duty on renewal, see page 60.

Onus of Proof

If occasion arises for the insurers to declare the policy void, the onus lies upon the insurers to prove a breach of the duty of good faith. (*Stebbing* v. "*Liverpool & London & Globe.*")

The following elements of proof must be established—

(A) Where the alleged breach is non-disclosure or concealment—

(i) That the fact was material;

(ii) That it was an actual fact, not a mere opinion;

(iii) That it was or should have been within the knowledge of the insured;

(iv) That the insurers were not informed thereof.

(B) Where the alleged breach is innocent or fraudulent misrepresentation—

(i) That the representation was made by the insured;

(ii) That it related to a material fact;

(iii) That it was inaccurate;

(iv) That (if innocent) the insured ought to have known of its inaccuracy; that (if fraudulent) it was false to the knowledge of the insured, or was made without belief in its truth or recklessly without knowledge as to whether it was true or false.

(C) Where the alleged breach is a breach of contractual good faith—

(i) That the breach of duty was the act or omission of the insured;

(ii) That the duty was expressly made contractual;

(iii) That the breach was within the limits of the duty expressly defined by the insurers.

(3) INSURABLE INTEREST

For the purposes of a contract of insurance, the event insured against must be one of which the happening has the character of misfortune to the insured. (*Lucena* v. *Craufurd.*) A wager cannot be a contract of insurance, even though it is expressed in similar form, and it is, therefore, important to distinguish a contract of wager.

Wager

A wager is a contract to pay a certain sum of money or other forfeit dependent on the result of an event of chance or skill. The event is not one by the mere happening of which the person who wagers stands to suffer misfortune, as if he abstains from any concern with the event its happening cannot affect him.

Contracts of wager were at one time enforceable at common law, but have been made unenforceable in almost all respects by various statutes. The effect of legislation is not to prohibit gaming or wagering, but simply to deprive the parties thereto of the assistance of the law. Therefore, whilst the law will not assist the winner in obtaining his winnings or the return of his money, it will equally refrain from assisting the loser who has paid over his loss and seeks to recover it.

A contract purporting to be a policy of insurance may be a wager and, therefore, unenforceable at law if the party who insures is not a party who may be detrimentally affected by the happening of the

event insured against. There is nothing, however, to prevent the parties treating the transaction as an "honourable" engagement and acting accordingly. "Honour" policies, therefore, depend for their fulfilment on sound dealing without legal assistance.

Insurable Interest

The fact that the happening of an event may have the character of misfortune to a person is known as insurable interest. It must be emphasized that the "happening" of the event, not the "result" of the event, is the governing factor. Having regard to the fact that both wager and insurance were at one time enforceable at common law, it must be considered what statutory enactments have created a distinction of legal treatment. The two statutes concerned are The Life Assurance Act, 1774 (the Gambling Act), and The Gaming Act, 1845.

Life Assurance Act, 1774

The Life Assurance Act, 1774, renders unenforceable insurances without interest on the life or lives of any person or persons, or "on any other event or events whatsoever." The Act expressly provides that no greater sum shall be recoverable from the insurers than the amount or value of the insured's interest. Whilst the statute does not confine itself to life assurance, it expressly excludes application to insurances on goods or merchandise or to mere wagers not expressed in the form of a policy.

Gaming Act, 1845

The Gaming Act, 1845, supplements the provisions of the former statute by rendering all wagers unenforceable. Being a wager, an insurance without interest on goods or merchandise would be void.

Pecuniary Value

The insurable interest must have a pecuniary value, and the sum recoverable is no greater than the amount thereof.

In the case of insurances on lives, insurable interest is presumed and no proof of pecuniary interest is necessary by a person on his own life, by a man on the life of his wife or by a woman on the life of her husband; in addition, in Scotland, by a father on the life of his son. For other insurances on lives insurable interest must exist at the date of the policy; the amount recoverable is the measure of interest at that date. The Life Assurance Act does not demand any interest at the date of the death, provided the policy was effected *bona fide* to cover the possibility of interest at that date.

A person who insures against loss of or damage to goods or against liability arising from an accident, can recover for his own benefit only his actual pecuniary loss at the time of the event. Provided a person has a pecuniary interest of his own in the goods, however, he can insure the interests of other persons as well under the same contract, and recover thereunder the full pecuniary loss, but must account to such other interests for the proceeds of the insurances. (*Waters* v. *"Monarch"*; *Maurice* v. *Goldsbrough*.)

NATURE OF INTEREST

In the case of loss of his own life or limb, the happening of the event clearly results in misfortune to the insured and is thereby sufficient to create insurable interest. Where the life or limb of another person is concerned, there must, with certain exceptions (see page 28), be some relationship between the insured and the subject of the insurance whereby pecuniary loss may result to the insured from the happening of the perils insured against. Thus a son who is partly or wholly dependent on his father for material welfare may insure in respect of his father's life; a servant has an insurable interest in the life of his employer, a partner in the life of a co-partner, a theatrical manager in the life of an actor.

In the case of property, the interest may arise out of ownership, possession, or contract. The principal interests of this nature are—

1. **Ownership.** "Sole," whether or not the owner is in possession of the property. Thus it may have been let, hired, pledged, or warehoused; e.g. house let to tenant, piano hired to a concert hall, goods with pawnbroker or in depository. Sole ownership may be (*a*) absolute or (*b*) limited; e.g. (*b*) life estate in land or chattels. Or it may be (*c*) legal or (*d*) equitable; e.g. (*c*) trustee; (*d*) *cestui que trust*.

"Joint," entitling each owner to insure the property in its entirety, including—

Joint tenants of lands or buildings, and simple joint ownership of goods, including partnerships.

Trustee and *cestui que trust*, as legal and equitable owners.

Personal representatives and beneficiaries, i.e. the administrators or executors of and the persons entitled to the property of a deceased person.

Trustee in bankruptcy and bankrupt.

Husband and wife: in respect of the separate property of the wife, the enjoyment of which is shared by the husband.

2. **Possession.** Lawful possession entitles the possessor to insure, whether or not there is a responsibility on the possessor for the safe custody of the property, e.g. the finder of goods or a person gratuitously safeguarding goods for the owner. A bailee who without contractual responsibility insures the full value of goods, can recover not only for his own interest but also for the benefit of the bailor (*Waters* v. "*Monarch*") unless he has limited the insurance to his own responsibility. Unlawful possession, e.g. trespasser or receiver of stolen goods, does not create an insurable interest. Generally, however, possession (as distinct from ownership) arises out of express or implied contract.

3. **Contract.** Including—

Vendor and purchaser. The vendor whilst he retains ownership, e.g. in land or buildings until conveyance; in goods until appropriated to the contract. The purchaser, by reason of his liability to fulfil the contract. The vendor has also an interest in goods, by virtue of lien, until the purchase price is paid.

Bailment, e.g. carriers, warehousemen, factors, hirers, pawnbrokers, and persons having goods for repair or to be worked upon.

Tenancy, e.g. the lessee of land or buildings.

Insurer, a contract to insure being a sufficient interest to support a reinsurance.

(4) INSURABLE EVENTS

Events upon the happening of which contracts of insurance may be made must be of an uncertain nature, either as to—

(*a*) Time, i.e. though the event *will* happen, the actual date of the event is uncertain; or

(*b*) Occurrence, i.e. the event may not happen at all.

CLASSIFICATION

Accident insurance is concerned solely with events of the latter class, such events being broadly divisible into three sections—

PERSONAL. Where the event is the death or ailment of or injury to a specified person.

PROPERTY. Where the event is loss of or damage to specified property.

LIABILITY. Where the event is damage or injury imposing a liability on the insured towards other persons.

Convenient titles have been adopted in each section by insurers to bring briefly to the mind of prospective insured the nature of the insurable event, e.g.—

PERSONAL. Personal accident; sickness; disease.

PROPERTY. Burglary; plate-glass; live stock; fidelity.

LIABILITY. Employers' liability; property owners' liability; public liability (e.g. arising out of vehicles or machinery).

Accident insurances are also made which constitute a combination of some or all of these sections, e.g.—

MOTOR. Liability, property, and (in many cases) personal insurance.

THIRD PARTY (DRIVING ACCIDENTS). Liability and property insurance.

ENGINEERING (BOILER, LIFT, ETC.). Liability and property insurance.

Insurance against fire and marine perils is frequently included in an accident policy (e.g. motor, special risks on jewellery, etc.). In addition various classes of fire and accident insurance are combined in one policy in regard to the perils arising out of the ownership or occupation of private dwellings and small trade premises, Comprehensive, All-in, and Omnium being terms used to describe such policies.

(5) CONTRACTS OF INDEMNITY

A contract of insurance is a contract to pay a sum of money on the happening of a specified event, unless other rights (e.g. reinstatement, repair, replacement) are specially reserved by the insurers in the conditions of their policy. Insurable interest (dealt with in Section 3) must, therefore, have a pecuniary value, and in the Life Assurance Act, 1774, it is specifically provided that no greater sum shall be recoverable from the insurers than the amount or value of the insured's interest; in other words, an insurance is a contract of indemnity only. (*Vance* v. *Forster; Castellain* v. *Preston.*) It is a matter of reasoning that the Gaming Act, 1845, has similar effect in connection with

insurances on goods and merchandise, as an insurance without interest would be a mere wager.

At first glance it is difficult to reconcile the principle of indemnity with (1) personal accident insurance and (2) valued policies on property. In the one case the insurers undertake to pay certain specified sums upon the happening of death or injury; in the other they agree that in the event of total loss the sum named in the policy as the value of the property shall be deemed to be the actual value of the property at any time during the term of insurance.

Such contracts, even though they create some measure of discrepancy in actual pecuniary loss at the time of the happening of the event, do not cease to become contracts of indemnity. In personal accident insurance, either the interest is such that its pecuniary value must be presumed or else the measure of insurable interest must exist at the date of the policy; in insurances on goods the legal reasoning adopted is that the parties, insured and insurer, have agreed at the inception of the contract the pecuniary amount of loss which would occur on the happening of the event instead of leaving this to be proved at the time of loss (*Burnand* v. *Rodocanachi; Lewis* v. *Rucker*); it only remains to prove that the event has occurred.

PERSONAL ACCIDENT

In personal accident insurance the pecuniary value of the insurable interest is presumed in certain cases (see page 28); in others the measure of loss must still be proved by persons who take out insurances against accidents to others. A man may insure his own life or limb up to any amount acceptable by insurers, and be able to recover personally or by his representatives the full amount of the insurance. A son, however, who insures for personal benefit the life or limb of his father —or a partner in respect of his co-partner—can recover only his own personal pecuniary loss as measured at the date of the policy.

VALUED POLICIES

With valued policies on property, it must be noticed that the valuation condition operates only for a total loss. Only the measure of loss can be recovered if the damage is partial. It will generally be found also—though this depends on the actual wording of the valuation condition—that insurers can still exercise in the event of total loss their policy stipulation to replace the property if they so elect.

A gross over-statement of value by the insured may give rise to a presumption of fraud, which, if proved—and it must be clearly proved— would have the effect of voiding the policy and absolving the insurers from any payment.

(6) PARTIES TO THE CONTRACT

There are two parties or groups of parties to a contract of insurance: (1) the insured; (2) the insurer(s).

INSURED

The insured may be an individual or a corporate body. Two or more

persons may be jointly the insured under one contract if the insured peril may affect the interests of two or more persons, or they may insure severally with the same or different insurers. In some instances some of the joint insured may be interested in part only of the perils covered by the policy.

Any person capable at law of making a contract may validly insure, but incapacity to contract does not necessarily make a contract of insurance void; the contract may in cases bind the insurers, unless the insured takes steps to avoid it—in other words, it becomes voidable by the insured. (See pages 9 to 13.)

INSURER

The insurer may be an individual or a group of individuals or a corporation. In practice, the business of insurance is carried on by—

(*a*) INSURANCE COMPANIES, i.e. corporations registered under the Companies Act, 1948 (and former Companies Acts), or constituted by royal charter or statute; friendly societies; and mutual bodies.

An incorporated insurance company may only undertake such classes of insurances as are authorized by the terms of its constitution, and any contracts of insurance not authorized therein would be void. (*In re "Phoenix Life," Burgess & Stock.*) A body of twenty or more persons constituted to carry on business for profit must be incorporated under the Companies Act, 1948; but associations formed merely for the purpose of receiving premiums and paying out benefits, the balance being divisible among the subscribers (i.e. mutual bodies), can lawfully transact business without incorporation, irrespective of the number of members.

(*b*) UNDERWRITERS, viz., members of Lloyd's or other associations approved by the Board of Trade, who, though they combine in groups to facilitate the transaction of business, undertake individually only such fractional part of the liability under each policy as is specified in the document.

ASSURANCE COMPANIES ACTS, 1909 to 1946

The transaction of certain classes of insurance business is regulated by the Assurance Companies Act, 1909, which applies to all persons, associations, or corporations, with the exception of—

(*a*) Underwriters who are approved by the Board of Trade; (*b*) Associations registered under the Friendly Societies Acts; (*c*) Trade unions; (*d*) Mutual associations formed mainly for the insurance of employers' liability risks incurred by their members.

The validity of policies is not affected by the Act, but certain penalties are provided for non-compliance with its requirements.

The Act relates to certain classes of insurance business transacted in Great Britain, viz. Fire, Life, Accident (fatal or non-fatal injury to persons, sickness or disease), Employers' Liability (see note below), Bond Investment and, by subsequent legislation, Motor (Road Traffic Act, 1930) and Marine, Aviation, and Transit Insurance (Assurance Companies Act, 1946). The power given under the Air Navigation Act, 1936, to extend the Assurance Companies Act, 1909, to Aircraft

Insurance was never actually exercised, and has since been superseded by the aforementioned provision of the Assurance Companies Act, 1946. The principal requirements of the 1909 Act are—

(*a*) Separate accounts must be kept for each class of business, and separate funds for certain classes, but not separate investments for each class.

(*b*) Annual returns must be made to the Board of Trade showing revenue and profit and loss accounts for each class, balance sheet and detailed particulars of outstanding claims.

(*c*) Provisions are made for audit, amalgamation and winding-up; and penalties are imposed for default or misstatements.

The absence, however, of any power in the 1909 Act enabling the Board of Trade itself to stop the trading of an insolvent Insurance Company gave rise to the passing of the Assurance Companies (Winding Up) Acts, 1933 and 1935 (see special notes in Appendix II).

The Assurance Companies Act, 1946, abolishes the requirements under the 1909 Act of making substantial deposits with the High Court when the above classes of insurance are transacted, and substitutes standards of share capital and solvency as follows—

(i) Paid-up share capital must be at least £50,000, unless the company transacted the statutory class or classes of insurance before 25th October, 1945.

(ii) After two years of trading (or such longer period as the Board of Trade may allow) a company can be wound up under the provisions of the 1933 and 1935 Acts if its assets do not exceed its liabilities by £50,000, or one-tenth of its "general premium income," whichever is the greater. "General premium" means all premiums from all sources at home or abroad other than life, industrial life, and bond investment.

(iii) An existing company may withdraw its deposits if it already satisfies the above standard of solvency.

(iv) An existing company is allowed a period of two years from 6th March, 1946 (or such longer period as the Board of Trade may allow) within which to satisfy the solvency standard.

Certain other requirements or exemptions regarding these standards are contained in the new Act in the case of Underwriters, Mutual Associations, Friendly Societies and Trade Unions, and companies whose business is guaranteed or reinsured by other companies.

By an Order made in 1948 under the National Insurance (Industrial Injuries) Act, 1946, the Assurance Companies Acts, 1909 to 1946, cease to apply to Employers' Liability Insurance, except in the case of a company carrying on no other class to which the Acts apply, but such a company need no longer render detailed particulars of its outstanding claims.

An external company operating in Great Britain would have to satisfy the requirements of the 1909 to 1946 Acts. Likewise, a British company has to comply with local insurance legislation when operating in many places abroad. Similar legislation is operative in Northern Ireland. The transaction of insurance in Eire is regulated by the Eire Insurance Act, 1933.

CHAPTER III

THE POLICY

CONTENTS—Stamp duty—Construction and effect—Exceptions—Conditions—Alterations: (1) assignment; (2) change of risk—Premium—Duration—Lloyd's policies

For Cases and Statutes cited herein, see Appendixes

(1) CONTENTS

THE policy of insurance is a printed or written document formally setting out particulars of the concluded contract which has been made between the insured and the insurers. It defines rather than completes the contract of insurance, as the contractual relations between the parties arise from the offer and acceptance dealt with in the preceding chapter, and the omission to issue or receive the formal document does not preclude the rights of the parties to enforce the actual contract. Even an oral contract of fire or accident insurance may be enforceable. (*Murfitt* v. "*Royal.*")

Although there are many types of policies by reason of the requirements of the different classes of insurance and the variations of different insurers, the contents of each document are divisible into certain distinct parts, viz.—

(*a*) HEADING. The name of the insurers and a few particulars of the policy for ready reference, such as the number of the policy, sum insured, first and renewal premiums, period of insurance, and renewal date.

With companies which transact personal accident, or motor insurance, the heading, if it states the authorized capital of the company, must also state the amount of capital subscribed and the amount paid up. The word "limited" (or abbreviation) must not be omitted if the company has limited liability.

(*b*) RECITAL. This states usually that a proposal constituting the basis of the contract has been made by the insured to the insurers and a certain premium has been paid or agreed for the insurance.

If the policy is under seal, the statements in the recital cannot be gainsaid by the insurers, even though there was no formal proposal and/or the premium had not been paid. The insurers are said to be "estopped" from denying such statements.

(*c*) UNDERTAKING. This will set forth that in consideration of such premium and subject to the observance by the insured of certain conditions contained in or endorsed on the policy, the insurers will provide insurance for a certain period of time and for subsequent periods for which renewal premium is accepted.

Under policies of indemnity (e.g. burglary) the undertaking is to "indemnify." This signifies a monetary indemnity for the amount of

the loss, unless the insurers reserve the right to reinstate or replace the property. In policies not of indemnity (e.g. personal accident) the undertaking is to "pay."

(*d*) PARTICULARS, giving a description of the person, property, or liability constituting the subject-matter of insurance and—if not particularized in the recital or cover—the period of insurance, and sums insured or limits of insurance.

(*e*) COVER, describing the risks which are to give rise to indemnity or payment in respect of such person, property, or liability and the extent to which those risks will be met by the insurance.

(*f*) EXCEPTIONS, consisting of limitations of the cover in certain circumstances. Sometimes called conditions, provisos, or stipulations.

(*g*) SIGNATURE. By a director or authorized representative of the insurers.

(*h*) CONDITIONS. The *general* terms governing the validity or enforcement of the contract, and the rights and duties of insured and insurer, e.g.—

(1) Acts which must be observed by the insured in presenting a claim.

(2) Particulars of or limitations of common law principles affecting the insured or the insurers, such as disclosure and subrogation.

(3) Rights of cancellation during currency.

(4) Rights in the event of assignment, increase of risk or existence of other insurances on the same risk (contribution).

(5) Procedure in the event of disputes (arbitration).

These conditions often follow the signature or are set out on the back on the policy. To be effective, they must be embodied in the policy by express incorporation, and a proviso is, therefore, generally made in the "undertaking" of the insurers as to the "conditions" forming part of the contract, or a general clause stipulates that the conditions must be read with the contract.

(*i*) ENDORSEMENTS. These are additions to the policy denoting—

(1) The *special* terms agreed between the insured and insurers, extending, limiting, or varying the usual terms of insurance. Limitations and extensions of the general form of policy are frequently expressed by printed slips gummed on the policy.

(2) Alterations during currency, such as assignment of the policy to new owners of the property, increase of insurance, change of address, etc. Printed slips are again used for many such alterations.

(2) STAMP DUTY

Section 91 of the Stamp Act, 1891, enacts that certain policies of insurance must bear revenue duty. The term "policy of insurance" is defined in that Act as every writing whereby any contract of insurance is made, or agreed to be made, or evidenced. The payment of duty is evidenced by embossed Inland Revenue stamps or by adhesive stamps; in the latter case the stamps must be cancelled by the person first executing the document, but the absence of a stamped policy does not affect the validity of the insurance. (*Thompson* v. *Adams*.)

The provisions of the Stamp Act, 1891, have been extended by the Finance Act, 1895; Finance Act, 1907; and the Finance Act, 1920, so that now the position is as follows—

A duty of 6d. must be paid on every policy except—

(*a*) In the case of policies other than those for which specific provision is made in the Stamp Act, 1891, viz., policies of fidelity, solvency, and liability insurance, such policies must be stamped as agreements, and the duties are 10s. if under seal, 6d. if not under seal. A policy combining insurances of this class with insurances provided for under the Stamp Act must be stamped both as a policy and as an agreement, e.g. motor (1s.) and comprehensive householders (1s.).

(*b*) Where by the nature of the insurance it is impracticable or inexpedient to stamp each policy, provision is made for compounding the duty. This mainly affects personal accident insurance provided by coupons or in newspapers, a percentage of the premium being payable to the Inland Revenue.

(*c*) No duty becomes payable on the policies of societies registered under the Friendly Societies Act, 1896.

(3) CONSTRUCTION AND EFFECT

Contracts of insurance are governed by the same general principles as other contracts; thus it is for the jury to decide questions of fact, but the construction of the words by means of which the intention of the parties is expressed is a matter for the court (i.e. the judge).

Construction of the Policy

The party seeking to enforce the contract would generally sue upon the policy, unless it was disputed or denied that the policy truly represented the concluded contract; and when the terms and conditions of the policy are in issue, the court is guided by certain general rules of construction, which have been consolidated in course of time. The chief of these are—

1. The intentions of the parties must prevail and their intentions must be ascertained from the policy, together with documents properly incorporated therein (e.g. the proposal).

2. The policy must be construed as a general document used by the insurers for the various persons who desire to insure. The effect of a decision in a particular case must therefore be considered in its relation to its effect on other cases which may arise.

3. In so far as the printed part of a policy is consistent with the written part, it is of equal importance. As the printed part, however, is, as a rule, a common form of wording for similar contracts, the writing will overrule the print if the latter is contradictory to the writing. Even though amendments in the printed part of a particular policy may have obviously been omitted through carelessness or the written part shows that some of the printed part is clearly not intended to apply, the court will not too readily reject the print. (*Hydarnes*

Steamship Co. v. "*Indemnity Mutual Marine*"; *Joyce* v. "*Realm Insurance Co.*")

4. The effect of an implied condition of insurance is displaced and limited by an express condition in the policy. Thus the common law duty of disclosure would be negatived by an express condition relating to "fraudulent concealment of facts," and the policy would be governed by the terms of the express condition.

5. Ordinary words in a policy must be given their popular meaning in the absence of any expressed intention in the policy to the contrary. (*Borrodaile* v. *Hunter*). If no definition appears in the policy legal terms are strictly construed. Their relation to the context will govern the breadth of the meaning of particular words. Thus a common characteristic running through the items of a particular exception will reveal and govern the individual items (e.g. the exception of wilful exposure to obvious risk accompanied by references to racing, entering or leaving trains in motion, etc., is not intended to embrace the act of walking across a crowded street). At the same time, this principle, known as the *ejusdem generis* rule, does not apply where the individual items of an exception refer to events of different character; thus in an exception against (1) riot or civil commotion, and (2) military or usurped power, the second part is not governed by the first, but would include the acts of foreign enemies.

6. Where there is a manifest ambiguity in wording, the intention of which cannot be reasonably ascertained, the words will be construed, if necessary, against the party making them. (*Cornish* v. "*Accident Insurance Co.*"; *Fitton* v. "*Accidental Death Co.*") Thus ambiguous words used by the insurers will not necessarily be construed in the same sense as the users intended, but in the sense in which they would be accepted by a reasonably-minded insured. Similarly, the answers of the insured to questions in the proposal will receive the meaning which would be reasonably attached to them by the insurers.

Questions of fact for the decision of the jury arise where parole evidence is admitted. Such evidence is not admissible to contradict or vary the construction of the policy itself, but will be heard where it is contended that the policy is void or fails to represent fully the concluded contract between the parties. Parole evidence may also be given to identify the subject-matter of insurance, or to prove that a special meaning attaches to particular words by reason of their meaning in particular districts or in special trades and occupations.

Effect of the Policy

The proposal which constitutes the offer to insure usually sets forth an undertaking by the proposed insured to accept the policy of the insurers in its usual terms and with its usual conditions. After conclusion of the contract, therefore, the insured becomes liable to accept and to pay premium for such a policy, i.e. the ordinary form of policy issued by the insurers. ("*General Accident*" v. *Cronk*.) If any special terms or conditions have been agreed between the parties, the policy should duly record them.

Thereafter, the rights and duties of the respective parties must be ascertained by reference to the policy. If any claim arises and is disputed, the insured's proper course is to sue upon the policy, i.e. to take action to enforce the contract as represented by the policy. There is a presumption in law that the policy represents the contract made between the parties.

Rectification—as to Rights

It is necessary to consider the position if it is disputed that the policy represents the true contract. Mistakes may occur by inadvertence and may not be noticed until after acceptance of the policy or until after a loss. The insured is at any time entitled to seek correction of mistakes which affect his *rights* and, if the insurers refuse, may seek the assistance of the court. Equally, the insured cannot force the insurers to exceed their true contract by seeking to take advantage of any mistakes. An insured, moreover, who is offered an incorrect policy cannot repudiate the insurance; he is bound to pay the premium if the insurers are prepared to rectify the mistake. ("*General Accident*" v. *Cronk*.)

A reference to the court in respect of an alleged mistake may show that the parties were never *ad idem*, that is to say, that no complete understanding was established during the negotiations between insured and insurers as to the terms of insurance, in which case the court will declare the contract null and void, and the obligations of both parties will cease to exist. If, however, a mistake is established, the court will make an order for rectification.

A difference between the terms of the policy and those in the proposal may not always be due to a mistake. It may be that the terms of the policy are intended as an offer to vary the insurance sought by the insured. In such event the insured by his conduct may show that he has accepted the revised terms; thus his failure to object after he has had reasonable opportunity to examine the policy might lead to such an inference. By suing upon the policy he is precluded from denying that it represents the true contract. Equally the insurers cannot set up a different contract when the insured by suing on the policy shows that he has accepted their offer.

Rectification—as to Duties

The same principles apply where the conditions contained in the policy governing the *duties* of insured and insurer are in dispute.

If a condition is inserted by mistake, the insured may have his policy rectified by agreement between the parties or by the court, as is the case where the mistake is in the terms of the insurance.

If a condition affecting the duties of the insured is inserted intentionally, and was not indicated in the proposal or during the negotiations, the insured may likewise seek rectification if a concluded contract was made which did not contain such a condition and thereafter enforce the policy as rectified.

If the introduction of the condition shows that the negotiations

for an insurance were not complete, no contract enforceable between the parties arises until the insured expressly accepts the condition, or, by his conduct, shows that he has accepted the condition, e.g. by refraining from any objection after he has had ample opportunity to examine the policy.

Some difficulty arises, however, in cases where the parties had reached a final agreement during the negotiations and the insured by reason of a loss takes action upon the policy, at the same time disputing a certain condition because it was not specifically mentioned or sufficiently indicated when the contract was made. In the case of *re Bradley and Essex and Suffolk Accident Indemnity Society* the remarks made in the summing up would seem to imply that, notwithstanding that the action is on the policy as issued, a condition as to the duties of the insured not foreshadowed in the proposal does not bind the insured, as it is the duty of the insurers to give the insured full and fair notice of the conditions. The weight of authority, however, tends to establish that the insured, by suing upon the policy as issued, confirms that as the true contract and is, therefore, bound by its conditions; he cannot at the same time set up a contract which differs therefrom. (*London Guarantee Co.* v. *Fearnley*.)

PRELIMINARY DOCUMENTS

In an action where it is sought first to rectify the policy, the court will consider the preliminary documents, such as the proposal and correspondence (*Griffiths* v. *Fleming*); their meaning or construction is a matter for the court. Parole evidence will also be heard as to what took place during the negotiations; such evidence is a matter upon which a jury can decide.

In an action upon the policy as issued, however, the policy represents the contract (*Griffiths* v. *Fleming*); and the court will construe with the policy only those documents or oral statements as are incorporated with or embodied in the policy by express reference. If not incorporated, such documents and statements can be referred to only for the purpose of explaining any ambiguity in the policy, or of establishing whether or not the policy, i.e. the contract itself, is binding upon the parties. The onus of proof in respect of the effect of preliminary documents and statements lies upon the party endeavouring to establish his case on the strength thereof.

(4) EXCEPTIONS

It is not possible to point to any particular part of a policy as the part where exceptions are always to be found, for they appear not only in the body of the policy, but also amongst what are generally termed the "Conditions." They should, however, be readily distinguishable from "Conditions" proper, for the latter are stipulations governing the rights of the insurer and the duties of the insured, while "exceptions," "provisos" or "exclusions" are those stipulations which restrict the scope of the protection afforded by the policy.

Exceptions relate principally to—

(*a*) The insured, where a class of persons is insured.
(*b*) The amount of insurance.
(*c*) The subject-matter of insurance.
(*d*) The perils insured against.

(*a*) In policies which cover a class of persons as well as the insured whose name appears in the policy, the insurers may except certain persons of that class; e.g. in coupon insurance, persons above or below certain ages; in motor-car policies persons who are not licensed drivers.

(*b*) In policies insuring against loss of indefinite dimension, the insurers may limit the amount which they will pay if such a loss occurs; e.g. in a liability insurance, the insurers may exempt themselves from liability beyond a stated amount.

(*c*) In policies covering a class of property, the insurers may except certain objects or classes of objects which would otherwise fall within the general words of the policy; e.g. in a burglary policy, the insurers may exclude valuable jewellery unless specifically insured.

(*d*) In policies which are effected against perils such as burglary, theft, accidental loss or damage, personal accidents, and public liability, the insurers may exempt themselves from payment where the peril arises from certain causes. The causes might be either such as would, but for the exception, give rise to the liability of the insurers by reason of the general terms of the policy, e.g. riot, civil commotion and war; or might be causes which do not come within the general terms, but which are stated to make it quite clear to the insured that they are outside the scope of the insurance, e.g. felonious suicide or the wilful act of the insured.

Onus of Proof

The onus of establishing that a loss has occurred by reason of the peril covered by the policy, i.e. proof of loss, rests upon the insured. To establish an exception, the onus lies upon the insurers (*Tootal, Broadhurst* v. *"London & Lancashire"*), unless it is clearly stated in the exception that it is the insured's duty to prove that the exception does not apply. (*Levy* v. *Assicurazioni Generali.*) The court will lean strongly against the insurers if there is any ambiguity in the exception, and the insurers must, therefore, use the clearest possible words in order to make the exception effective. (*Cornish* v. *Accident Insurance Co.*)

Prohibited Exceptions

By Section 12 of the Road Traffic Act, 1934, it is provided that in relation to personal injury claims within the scope of the insurance provisions of the Road Traffic Act, 1930, certain exceptions, if appearing in motor policies, shall be of no effect, but the insurer is given a statutory right to recover from the insured any payment to a third party which has to be made by reason only of this prohibition.

(5) CONDITIONS

Conditions dealt with in this section relate to the duties of the insured and the rights of the insurer.

Conditions may concern matters which arise either precedent or subsequent to the making of the contract, or subsequent to the loss. Certain conditions are *implied* in contracts of insurance by virtue of statute and common law; others are *expressed* in the policy itself.

The word "Conditions" is used in many forms of policies in a somewhat wider sense, viz., it often embraces *provisos* and *exceptions* which may restrict the scope of the protection afforded by the policy, and also *stipulations* having an indirect bearing on the contract. The *conditions* dealt with in this section are those whereof the observance directly governs the validity of the policy itself, or the enforcement of a claim for loss covered by the policy.

Implied Conditions

Implied conditions are conditions which govern a contract of insurance or a particular claim, but are not expressed in the policy itself. Their effect may be waived, extended, or modified during the negotiations between the parties or by the nature of the express conditions in the policy. There are four, and only four, implied conditions in policies of insurance, viz.—

1. Good Faith. That both insured and insurers shall exercise good faith in all material circumstances.
2. Insurable Interest. That the insured has an insurable interest in the subject-matter of insurance.
3. Existence. That the subject-matter of insurance actually exists when the contract of insurance is made.
4. Identity. That the subject-matter of insurance is sufficiently described by the proposed insured as to inform the insurers of the nature of the risk to be undertaken, and as to enable them to define such risk in the policy and to ensure the identity of the subject-matter in the event of loss. (*Cosford Union* v. *"Poor Law & Local, etc."*)

Express Conditions

Express conditions are those conditions which are set forth in the policy.

Some of these may relate to matters which would otherwise be implied: thus, the implied duty of good faith may be (1) modified by an express condition that the policy shall be void in the event of fraud; or (2) extended by an express condition that the liability of the insurers shall rest on the actual truth of the statements made by the insured in his proposal, not merely his good faith. (*Thomson,* v. *Weems.*)

The various stipulations contained in a policy of insurance are not conditions unless it is clear that they relate to matters which go to the root of the contract, or unless it is clearly expressed in the policy that observance of such stipulations shall govern the validity of the insurance or the enforcement of a particular loss. Thus, stipulations that

the insured shall pre-pay his premium, and shall notify a loss within a particular time, are not conditions unless qualified by suitable words expressing the effect of failure to observe such stipulations. See, further, page 43.

Classification of Conditions. The principal express conditions relate to—

1. Good faith, viz., either expressing verbatim the implied duty or limiting or extending it.
2. Payment of the premium.
3. Consent of insurers to other insurances on the same subject-matter.
4. Rateable contribution if other insurances exist.
5. Termination of the policy during currency.
6. Assignment of interest.
7. Alteration of risk.
8. Notification, particulars and proof of loss.
9. Subrogation.
10. Arbitration.

Conditions Precedent and Subsequent

Conditions, both implied and express, divide themselves into three classes as concerns their operation, viz.—

I. Conditions precedent of the policy.
II. Conditions subsequent of the policy.
III. Conditions precedent to the liability of the insurers.

Conditions Precedent of the Policy. Conditions precedent of the policy are those which concern matters which *precede the making of the contract* of insurance, and which by implication or by agreement between the parties govern its *validity*. Amongst such conditions would be those which relate to—

Good faith, i.e. disclosure of all material factors in the risk.

Truth of the statements and representations made by the proposed insured.

Insurable interest.

Existence and identity of the subject-matter.

If such conditions have not been observed, the contract is voidable *ab initio*; that is to say, no claim can arise under the policy, unless the insurers waive the breach of condition.

Conditions Subsequent of the Policy. Conditions subsequent of the policy are those which concern matters which arise *after the making of the contract* of insurance, and which by implication or by agreement between the parties govern the *continuance of its validity*. Amongst such conditions would be those which relate to—

Consent of insurers to other insurances on the same subject-matter.

Assignment of interest.

Alteration of risk.

Fraudulent claims. (A fraudulent claim is a breach of the duty of good faith, and, therefore, not only absolves the insurers for the particular loss concerned, but also for any subsequent losses.)

If such conditions are not observed, the contract becomes voidable as from the *date of breach* of condition, that is to say, no claim can arise after the condition is broken unless the insurers waive the breach, though the insured is entitled to recover for any loss which arose before the breach.

The condition dealing with the termination of the policy is also a condition subsequent thereof; when the terms of such condition are duly exercised, the policy ceases to continue as regards *subsequent* losses.

Conditions Precedent to Liability. Conditions precedent to the liability of the insurers are those which concern matters which arise *after the occurrence of a loss* covered by the policy, and which by agreement between the parties govern the *enforcement of a claim* against the insurers. Amongst such conditions would be those which relate to—

Notification, particulars and proof of loss.

Pre-payment of premium.

Arbitration.

If such conditions are not observed, the liability of the insurers *in respect of the particular loss* does not arise (*London Guarantie Co.* v. *Fearnley; Welch* v. "*Royal Exchange*"); that is to say, the claim cannot be enforced unless the insurers waive the breach. The contract of insurance, however, still subsists, so that the insured can still claim for a subsequent loss covered by the policy, provided that he has then observed the conditions.

The condition dealing with contribution if other insurances exist is also a condition precedent to the liability of the insurers, the effect of it being to cancel or limit, according to its terms, the amount payable by the insurers in respect of the loss.

Breach of Condition

The conditions are inserted in policies by the insurers for their own protection, and form an integral part of the contract between insured and insurers. When the insured has contracted subject to certain conditions, he cannot challenge them afterwards on the plea that they are unreasonable (*Dawsons, Ltd.* v. *Bonnin; Thomson* v. *Weems*), nor can the insurers impose further duties upon the insured if it transpires that the conditions are insufficient for the protection of their interests.

The insured has discharged his duty by literal observance of the conditions, and the responsibility for such observance lies primarily upon him; thus, if the insured is required to give written notice of an accident to the insurers personally, it is not sufficient to give written notice to an agent of the insurers unless the latter duly transmits it to the insurers. Unless the act required of the insured is expressly or by its nature a personal act, it may be done by his agent or even by a stranger on behalf of the insured.

Equally the question whether there has been a breach of condition is literally construed. A duty imposed personally on the insured by the policy does not of itself extend to the act of an agent. Thus a stipulation that the insured shall take reasonable precautions to prevent

accidents does not imply that the policy will be inoperative if a competent employee of the insured fails to exercise due care (*Woolfall and Rimmer* v. *Moyle*).

As the conditions are a part of the contract, the nature of the cause of a breach of condition cannot excuse its non-observance. Thus the position of the parties is the same whether the breach occurs through inadvertence or negligence (*Dawsons, Ltd.* v. *Bonnin*), as it is when deliberately committed. Even where the insured is required to encompass some act by a third party, the fact that the third party declines to act does not relieve the insured of his duty. A condition, however, which has not at any time been capable of observance, i.e. an impossibility *ab initio*, would be void, and have no effect on the contract.

A condition expressed in general words must be observed within reasonable limits. Thus a condition requiring "immediate" notice of accident is satisfied if notice is given as soon as reasonably possible; but if the condition goes into detail, e.g. by stipulating that notice must be given within seven days of accident, the condition must be literally fulfilled.

To protect themselves adequately, the insurers must express clearly those acts which are to be done or which are prohibited. Thus a condition in a liability policy prohibiting the insured from admitting his liability to the claimant would not be broken by the insured having confessed his fault to other persons; nor, if the condition requires him not to admit fault to any third persons, would the insured be guilty of a breach if the admission was made by his servant or agent without his authority.

Onus of Proof

The conditions being for the protection of the insurers, the onus of proving that a breach of condition has occurred, and that the insured is thereby disentitled to recover under the policy, lies upon the insurers. When the onus is discharged, the breach not only affects the insured, but, unless otherwise provided, has equal effect on all persons who may have a right of claim through the insured, such as his personal representatives, assignee, or trustee in bankruptcy. (*In re Carr and "Sun."*)

Waiver of Breach

It would not be strictly correct to say that a policy is void or that an insured's right of claim is nullified by reason of non-observance of, or breach of, a condition precedent or subsequent of the policy or precedent of liability. The insurers may elect to waive a breach, in which case the contract or the right of claim is unimpaired; that is to say, when waiver has been made, the insurers cannot afterwards take advantage of the breach. The insurers, moreover, may dispense with the observance of a condition, in which case they cannot afterwards call for it to be fulfilled.

Waiver of a breach of condition may be made either (1) expressly or (2) by conduct—

1. **Express Waiver.** By intimation from the insurers that the observance of a condition is unnecessary, or that the contract or right of claim will remain good, notwithstanding the breach.

If the policy stipulates that any waiver of a condition must be made in writing in a specific manner and/or by a specified person, the terms of such a condition will be regarded.

Otherwise the waiver may be given by an agent of the insurers acting within his authority, and may even be oral.

2. **Waiver by Conduct.** The insurers may act in such a manner as to raise the presumption that they do not require observance of, or that they waive, a breach of a condition, viz., by doing some act which can reasonably be interpreted by the insured as showing that they do not rely upon the condition.

This may happen—

(*a*) Where observance is impossible, e.g. a condition in a live stock insurance requiring the death of a horse to be certified by a qualified veterinary surgeon would be waived if the insurer's own veterinary surgeon ordered the destruction of the horse so that subsequently it could not be examined.

(*b*) Where observance is unnecessary. Thus if the insurers repudiate a claim on the grounds of fraud a condition in the policy that the amount of loss must be determined by arbitration cannot be relied upon to prevent the insured from taking action to enforce the contrac (*Jureidini* v. *National British and Irish Millers.*)

(*c*) When an act of the insurers is inconsistent with an intention to rely upon a breach of condition. Thus the insurers might proceed to negotiate in regard to a claim or accept a renewal premium with knowledge that full disclosure had not been made by the insured when the insurance was effected.

The conduct of the insurers in connection with a breach of condition may, moreover, be sufficient as waiver, even where the policy specifically stipulates as to the manner in which waiver may be made.

Waiver by conduct cannot be substantiated unless and until the insurers have full knowledge of the facts which constitute a breach of condition; thus the issue of a claim form does not of itself waive a breach of condition as to notification of accident if the insurers are unaware at the time that the accident is of remote occurrence. Nor is a merely negative act sufficient to constitute waiver; such as a failure to indicate, before investigation of a claim, that the premium has not been paid. (*Simpson* v. "*Accidental Death Co.*")

STATUTORY WAIVER

By Section 38 of the Road Traffic Act, 1930, it is provided that an act or omission on the part of the insured after an accident in relation to matters arising out of the accident shall be of no effect in connection with claims for personal injuries within the scope of the provisions of the Act, but the insurers may impose a condition that the insured shall repay them if any payment has to be made to a third party in such circumstances.

STIPULATIONS

A policy of insurance contains sundry clauses which are described by various names, and which for the purposes of this section may be referred to generally as stipulations.

When it becomes necessary to determine which stipulations can be construed as "conditions," i.e. as conditions precedent or subsequent of the policy or precedent to the liability of the insurers, it must be clear from the negotiations between the parties, and from the wording of the policy itself, that such stipulations were intended by the insurers as conditions, and were agreed by the insured to be inherent to the contract. (*Bradley* v. "*Essex & Suffolk.*") Otherwise a breach of the stipulation will not void the policy or a right of claim, though it may give rise to the somewhat doubtful remedy of a counter-action, by the insurers for damages.

It may be taken that a stipulation which relates to a matter which goes to the root of the contract, or to a matter which is essential to the liability of the insurers, is a condition without any express form of words; for instance, a stipulation which affects a matter which is clearly material to the risk, or upon the basis of which the insurers agreed to contract, would be a condition. (*Dawsons, Ltd.* v. *Bonnin.*) If the insured has completed a personal accident proposal which states that he will not engage in motor-cycling, then it is clear that a stipulation in the policy prohibiting motor-cycling is a condition precedent to liability. Similarly, a statement that the insurance is accepted at the same rate of premium as that payable under a policy with other insurers is a condition precedent of the policy.

A stipulation relating to a matter which is collateral to the contract is not a condition unless it is clearly shown in the policy to be the intention of the parties that it should be construed as a condition. Its mere description as a condition is not sufficient, nor would it appear that its inclusion under a number of stipulations which are referred to in bulk as conditions precedent is necessarily effective. It has even been held that, to be effective as conditions, attention should be called in the proposal to collateral stipulations of a stringent nature. (*Bradley* v. "*Essex & Suffolk.*")

It may be taken that collateral stipulations would be construed as conditions if they are individually called conditions precedent, or warranties, or provisos, or if it is specially stated that failure to perform the obligation imposed by the stipulation will nullify the policy or free the insurers of liability; but, even then, a stipulation which, from its very nature, cannot be capable of precedent fulfilment, cannot be construed as a condition precedent, e.g. a condition that the insured shall give the insurers all reasonable assistance in the recovery of stolen property.

(6) ALTERATIONS

A contract of insurance is personal as to parties—the insurers are dependent upon the *uberrima fides* of a certain person (the insured), whose insurable interest is covered by the policy.

The contract, moreover, is particular as to risk—the insurers contract in respect of the material circumstances of an ascertained subject-matter which is described in the policy.

It does not follow, however, that no other person can acquire rights against the insurer under the contract, or that any change of the circumstances of the risk would vitiate the policy. The matter must be considered under two heads, viz. (1) assignment, and (2) change of risk.

A. ASSIGNMENT

It is possible for the insured to assign—

(*a*) The subject-matter;
(*b*) The policy; and
(*c*) The proceeds of the policy;

that is to say, to establish a change of the ownership and/or other interest in each of these to another person (the assignee), so as to confer rights and/or duties on the assignee, and partially or wholly to divest the original insured of his rights and/or duties. It is necessary to consider the effect of each of these events on the contract of insurance.

(*a*) **Assignment of the Subject-matter.** This is a change of interest in the ownership of, or possession of, or the beneficial interest in, the subject-matter of insurance.

It cannot occur where the subject-matter is a person and, therefore, does not affect personal accident insurance.

A change of interest in property happens on the death or bankruptcy of the insured, or, in the case of a company, its liquidation, for the property then passes by operation of law to the personal representatives, trustee, or liquidator.

It also happens where the interest in property is wholly or partially transferred to another person by sale, gift, hire, mortgage, charge, or other means.

In cases where there is a total assignment of the subject-matter, e.g. sale, gift, bankruptcy, or liquidation, the property passes to the purchaser, donee, trustee in bankruptcy, or liquidator, as the case may be. (*Castellain* v. *Preston.*) The insured loses all insurable interest in the property and, therefore, any right of claim under the policy.

Where there is a partial assignment of the subject-matter, e.g. mortgage, pledge, or bill of sale, the insured still retains an insurable interest; if the insured mortgages his estate, he may retain possession, subject to the rights of the mortgagee; if he pledges his chattels, he loses possession, but retains ownership; with a bill of sale he loses ownership, but retains possession.

In the absence of any provision in the policy as to assignment of the subject-matter, the insured still has a right of claim under the policy by reason of any interest he retains, i.e. where the assignment is partial.

An assignment of the subject-matter not only affects the interest of the insured where the peril insured against is loss of or damage to the property, but also where the peril is a liability; e.g. where he sells a business, he may thereby free himself of any liability which may

arise from the use of machinery or the employment of servants in the business; where he sells his motor-car, he may thereby cease to be involved in liability which might arise from the use of it. In such cases he creates an entire change in the insurable interest in the subject-matter, and ceases to have any right of claim under the policy.

(*b*) **Assignment of the Policy.** The assignment of the subject-matter has been considered from the point of view of its effect on the insurable interest of the original insured and, therefore, its effect on the contract between such insured and the insurers.

By reason of the assignment of the subject-matter, another person or persons acquire an interest in the subject-matter, but it does not *necessarily* follow that such persons step into contractual relations with the insurers and thereby acquire a right of claim under the policy. (*Rayner* v. *Preston*.) Such a right cannot arise unless by law or agreement there is an assignment of the policy, i.e. of the contract of insurance.

For the assignee to acquire such a right, it is clearly necessary that, simultaneously with or in connection with the change of interest in the subject-matter, there should also be an assignment of the policy.

An assignment of the policy may either be a transfer of interest in the whole contract, or the addition of a joint interest in the insurance, according to whether the original insured retains any interest in the subject-matter; e.g. a sale would necessitate total assignment of the policy; a mortgage would give rise to the addition of the joint interest of another insured, the mortgagee.

It has to be considered by what means an assignment of the policy does attend the assignment of the subject-matter, i.e. whether or not the process is automatic or whether it depends on the consent of the insurers.

The position is as follows—

(i) BY OPERATION OF LAW. On the occurrence of the death of the insured, of his bankruptcy, or, in the case of a company, of its liquidation, the property of the insured passes by operation of law to the personal representatives, trustee in bankruptcy, or liquidator; the policy constitutes part of the estate of the insured and, therefore, passes to such persons with the other property.

No specific assignment of the policy is, therefore, necessary, unless it contains a provision that the liability of the insurers to the new insured will not arise until their interest is endorsed. The personal representatives, whether appointed by will or intestacy, or trustee or liquidator, may enforce the policy both for claims which arose when the original insured had an interest, subject to any breach of condition on his part, and for claims which arise whilst the property is in their hands. When in the course of administration of the estate they pass the property to a beneficiary or purchaser, they may also assign the policy, and this becomes an assignment by operation of law, so as to give the beneficiary or purchaser the benefit of the policy.

In this connection, however, it must be borne in mind that in a liability policy, e.g. motor insurance, the law does not operate to

substitute a new subject-matter; the policy may devolve on the personal representative or beneficiary so far as loss of or damage to the property is concerned (and may also contain specific provision for indemnifying personal representatives for liability incurred by the deceased insured by virtue of the Law Reform (Miscellaneous Provisions), Act, 1934) but does not replace the risk of "liability of the insured" with that of "liability of the personal representative or beneficiary" arising out of the use of the property.

(ii) ACT OF PARTY. The assignment of the subject-matter by sale, gift, mortgage, charge, or other act of parties, introduces a new interest therein, either in lieu of or jointly with that of the original insured.

Unless there is any provision for such an event in the policy, the consent of the insurers must be obtained for the assignment of the policy, that is to say, before the new interest can acquire any rights under the policy (*Rayner* v. *Preston*); the insurers if they so wish may refuse this consent. Sometimes, however, the policy may contain a condition that it will pass to the new interest on assignment of the subject-matter, e.g. in the case of a change in a partnership, or the sale of a business; sometimes it may provide that the policy will be assigned on receipt of notice of the new interest.

The assignment of the policy introduces a new insured, who becomes entitled to enforce the insurance, in his own name, for any loss after the assignment in respect of which the policy covers his insurable interest. Unless the insurers, however, make a new contract with the assignee, i.e. take a fresh proposal from him as a basis for the continuance of the insurance, the assignee takes the policy subject to its existing faults, if any; thus, if the original insured has failed in his duty of disclosure, the insurers retain the right to declare the insurance void.

(*c*) **Assignment of the Proceeds of the Policy.** An assignment of the proceeds of the policy does not disturb the insurable interest upon which the insurance is based, and, therefore, the relationship between insured and insurers still subsists. It is an assignment of the right to receive the money payable under the policy, and may occur—

(i) By the insured assigning to another person his beneficial interest in any sums which may become due to the insured under the policy.

(ii) By the insured assigning to another person the proceeds of a claim which the insured has already made under the policy.

(iii) By statute (Road Traffic Act, 1934).

In the first two cases an assignment of the proceeds of an accident policy is an assignment of a chose in action, and is effective in equity or under the provisions of the Law of Property Act, 1925, the consent of the insurers being unnecessary.

The value to the assignee of the assignment of the proceeds, however, depends on the right of claim by the insured. It cannot, therefore, be enforced if there is a breach of condition by the insured, e.g. of notification of the loss.

The value of the assignment would also be defeated by a condition in the policy prohibiting assignment of the proceeds, but such a condition must be clearly expressed—the ordinary condition dealing

with assignment of the policy would not affect the insured's right to transfer his interest in the proceeds.

It will have been observed that the assignment of the subject-matter of a personal accident policy and *ipso facto* of the policy itself is impossible, and, therefore, such a policy can be transferred to another person only by a new contract. There would not appear to be any obstacle, however, to the assignment of the proceeds of such a policy, unless excluded by an express condition.

By the Road Traffic Act, 1934, a person obtaining judgment against a motorist for compensation for injury within the scope of the provisions of the Road Traffic Act, 1930, can in certain circumstances levy the judgment directly upon the insurer whose policy indemnifies the motorist. This is in effect an assignment by law of the proceeds of the policy, as in the absence of the statutory provision the only person who can recover under the policy is the insured.

B. Change of Risk

By this term it is intended to refer to a change in the attendant circumstances of the subject-matter, from which arises the insurer's risk of the happening of the event covered by the policy.

A change of the *subject-matter itself* is not strictly speaking a change of the insurer's risk, but the substitution of a new subject-matter, the identity of which does not correspond to the description in the policy. (*Cosford Union* v. "*Poor Law & Local, etc.*") In such case the policy fails to apply simply because the insurers have not undertaken the risk in respect of the new subject-matter; the contract would continue only if the insurers consented to transfer the cover of the policy to the new subject-matter.

Thus a motor policy may cover a car identified by its make and registered number; if the insured sells this car and buys another the policy would not ordinarily apply to the new car unless the insurers agree to alter the contract. If the subject-matter of a burglary policy is described by reference to its location in a particular house, the policy does not cover the property after its removal to another house, as it fails then to correspond to its identity in the policy. Similarly with a change of business, e.g. where stock on certain premises is described by reference to the occupation of the insured—in an insurance for John Smith, baker, on goods in trade, the subject-matter *would lose its identity* if John Smith becomes an ironmonger.

Such instances must not be confused with cases where the identity of the subject-matter *still remains unchanged*; e.g. if a baker insuring in respect of a motor-van becomes a confectioner, this is a change of circumstances, not a change of identity of the subject-matter, i.e. the motor van, and for this reason a limitation to the originla business will usually be stipulated in the policy.

The insurer estimates his risk *inter alia* on the attendant circumstances of the subject-matter of insurance identified in the policy, but it does not necessarily follow that the insurance contemplates an exact continuity of these circumstances. (*Farr* v. "*Motor Traders'*

Mutual.") Thus there are two cases where a change of circumstances does not constitute a change of risk, viz.—

(*a*) Where the change of circumstances does not affect the description of the risk in the policy, even though it may increase the risk; e.g. if a clerk is insured under a personal accident policy, he does not in the absence of any provision in the policy change his risk by engaging in motor-cycling for pleasure; his person, age, occupation, etc., by which he is described in the proposal and policy remain unchanged.

(*b*) Where the change of circumstances, though affecting the description of the risk, can upon construction of the policy be said to have been within the contemplation of the parties when making the contract; e.g. if, under a personal accident policy without territorial limitation or other provision, the insured resident in England goes abroad during the currency of the insurance.

A change of risk is, therefore, a change of circumstances which, whilst not changing the identity of the subject-matter, affects the description of the risk in the policy and was not contemplated by the parties when making the contract. The risk is usually described in the policy, and/or in the proposal which may form the basis of the policy, by reference to the nature, identity, and use of the subject-matter and the occupation or business of the insured, by reference to the nature of the perils which may give rise to a loss, and by provisions limiting the scope of the territory, user, occupation, or other features within the limits of which the insurance will apply.

A change of risk, where the identity of the subject-matter is unchanged, does not avoid the insurance unless specifically prohibited by the policy, or unless it amounts to a breach of good faith or the breach of a condition subsequent of the policy. In certain cases where there is a condition subsequent, the alteration may have the effect of temporarily suspending the operation of the policy, viz.—

(*a*) Where there is a condition to that effect, e.g. where a motor policy excludes liability whilst the car is used for racing.

(*b*) Where such an intention is within the contemplation of the insured and insurers; e.g. if certain specific property insured whilst in a particular place is removed, it may be clear from the contract that the insurance re-attaches upon its return.

In other cases the language of the condition subsequent may show that the policy is avoided.

Whether a change of risk is prohibited by the policy is a question of construction. The policy may contain particulars of the use and locality of the subject-matter, the occupation of the insured, and other circumstances, none of which may be necessary particulars for the identification of the subject-matter, but merely representations made by the insured when making the contract. Whether these particulars are merely to be construed as representations which show the circumstances at the time of insuring, or whether they are contractual circumstances upon the continuance of which the insurance depends, is a matter which is determined by the language of the policy. (*Farr* v. "*Motor Traders' Mutual.*")

Where a statement is made honestly by the proposed insured as to his future intentions, and is a mere representation, his insurance is not affected by his changing his intentions; if it is contractual, however, that his intentions shall remain unaltered, the insurance would cease to apply either temporarily or permanently as the case may be; e.g. where the proposal states the intention of the insured to use a motor vehicle for a particular purpose, use for other purposes would not affect the validity of the insurance unless continuance of the original use can be construed as contractual, or there is an express condition in the policy limiting the use.

An express condition in the policy against change of certain circumstances of the risk might either be absolute, and show that the policy would be avoided or suspended; or it might merely specify the procedure to be adopted in order that the insurance may continue. Thus it may permit the insured to make alterations provided notice is given to the insurers—unless there is a stipulation for prior notice, it is sufficient to give notice within a reasonable time of the alteration —or it may stipulate that the policy becomes void until notice is given, or that the insurers' consent must be obtained and, if necessary, an additional premium paid.

(7) PREMIUM

Definition

Offer, acceptance, and consideration are the three elements of a simple contract. In contracts of insurance, the consideration is known as premium and is usually in money, though money does not constitute the only form of consideration for a contract. The only other form of premium to which attention need be drawn in contracts of insurance is the liability, in mutual insurance, assumed by each member to contribute to the losses of his fellow-members in consideration for the protection granted to himself.

Amount

The amount of premium is an essential ingredient of the offer to insure. Offer may be an act of the proposed insured or of the insurer. In many classes of accident insurance, the premiums or rates of premium for each kind of insurance are published by the insurers in a prospectus containing particulars of the insurance and a form of proposal. In the absence of qualification, the completion and submission of a proposal constitutes an offer to pay the premium cited in the prospectus. (*"General Accident"* v. *Cronk.*) If the insurers consider the proposed insured a normal risk, they will accept and the contract is made. If they do not, they may make an offer to insure at a different premium, which offer becomes a matter for acceptance by the proposed insured.

In many cases the submission of a proposal is not an offer, but an inquiry for a price, i.e. a quotation. The insurer's quotation then constitutes an offer to insure, and fixes the amount of the premium.

Occasionally the parties may make a contract of insurance without fixing the amount of premium. It is not essential to a concluded contract that the precise amount of premium should be agreed at the making of the contract, but if it is not agreed the negotiations must show that the parties have agreed to postpone the fixing of the premium. If no amount is prearranged, the insurers are not entitled to charge any fanciful premium, but have a right to seek payment of a reasonable amount, the term "reasonable" depending upon what was contemplated in the negotiations, e.g. what they would charge for other similar risks. Sometimes the insurance is made in consideration of the payment of an initial premium, and thereafter the payment of a further premium to be calculated on a basis settled in the negotiations for the contract—the method of calculation is generally stated in the policy, as in employers' liability insurance; or it may have been agreed to increase or reduce the initial premium in certain events, such as certain defined changes in the risk.

PAYMENT

In practice, the insurers accept payment of the premium in many different ways, but unless they have otherwise agreed, they are not bound to accept otherwise than a money payment.

In the course of business, however, it may be clear that they have, either expressly or impliedly, agreed to accept payment by other means, e.g. by cheque or promissory note, which, if duly honoured, constitutes a good form of payment as from the date the cheque or note is accepted as payment—not the date when it is honoured. If the cheque or note is dishonoured, there is no payment unless the insurers chose payment by this means in preference to money.

Where there is a running account between the parties, the periodic settlement constitutes a good form of payment, and upon settlement the premium is deemed to have been paid from the date upon which it was debited in account.

The payment of premium may be made by the insured in person or by an agent on his behalf, or even by a third person (e.g. fidelity guarantee insurance) (*In re "Economic"*); or by the personal representatives of a deceased insured, unless the policy contemplated payment by the insured in person. (*Simpson* v. *"Accidental Death Co."*)

NON-PAYMENT

In the absence of qualification, the agreement by the insured to pay a premium and by the insurers to insure are separate and distinct obligations. (*"General Accident"* v. *Cronk.*) The non-payment of premium before loss, therefore, does not relieve the insurers of liability to pay claims (*McElroy* v. *"London"; Thompson* v. *Adams*), unless it can be shown—

1. That by the policy it is made a condition precedent of liability that the premium shall be paid before loss. If the insurers have not parted with the policy, it must be shown that the insured had notice of such a condition in the negotiations or otherwise, as he

cannot be presumed to have knowledge of the conditions of a policy which he has never seen.

2. That payment of the premium within a fixed time was a term of the contract, e.g. payment on renewal within fifteen days of grace. Failure to issue a renewal notice does not render the insurers liable for a loss after the date of expiry of the insurance, even if the loss occurs within the fifteen days of grace which is usually granted by the renewal notice. (*Simpson* v. "*Accidental Death Co.*")

3. That the insured's failure to pay amounted to a repudiation of the contract, e.g. where he had failed to pay after continual demands or had refused to pay.

As the payment of premium by the insured is a separate obligation, the insurers may, if the premium be unpaid, bring an action for recovery of the premium independently of their own obligations under the policy. ("*General Accident*" v. *Cronk.*)

Payment of the premium is frequently made a condition precedent to the liability of the insurers. There are certain cases, however, in which the insurers may be held to have waived the condition and, consequently, may be liable for a loss occurring before payment or even if the premium is never paid, viz.—

1. Where the insurers refuse to accept the premium when properly tendered.

2. Where payment is to be made by a third person and the insurers by their conduct lead the insured to believe that payment has been made. (*In re "Economic.*")

3. Where the condition is expressly waived by the insurers, e.g. by granting credit or accepting a negotiable instrument which is duly honoured.

4. In policies under seal, if the recital sets forth that the premium has been paid. The presence of the usual condition precedent in such a policy has been held not to be strong enough to override the recital, but it would appear that the use of more emphatic words in the condition would do so, e.g. that no liability is to arise until the premium has *actually* been paid.

On the other hand, waiver is not implied from the mere fact that the insurers have delivered the policy; and in policies not under seal the recital that the premium has been paid does not, except in a Lloyd's policy, override the condition, such recital being regarded only as words of style to express the consideration for which the insurers agree to contract.

RETURN (TOTAL)

The insured may be entitled to a return of the whole of the premium if, notwithstanding the issue of the policy, there is no valid contract between the parties or if the insurers are never at risk under the policy, for then the contract would be void *ab initio*, e.g.—

1. If the parties were never *ad idem*, i.e. were both honestly mistaken as to what insurance was intended to be effected.

2. If the insurance was *ultra vires*, i.e. where a company makes an insurance of a class not authorized by its memorandum of association.

3. If, by reason of the breach of a condition precedent of the policy, the insurance never comes into operation; e.g. where the policy is avoided by reason of non-disclosure or misrepresentation by the insured, breach of good faith by the insurers, mis-description of the subject-matter, or absence of insurable interest. Where the insured has been fraudulent, however, he cannot enforce a return.

4. If the insurance is illegal. In such case the insured must claim return of the premium before the risk attaches; afterwards it depends whether he was *in pari delicto* with the insurers, i.e. whether he knew or should have known that the contract was unlawful.

The insurers would never be at risk if the subject-matter ceased to exist before the commencement of the insurance, e.g. if already destroyed, or if the risk never came into operation, e.g. where a person whose fidelity was to be insured in a particular employment did not take up the employment. It must be clear in such cases, however, that the insurers never incurred risk at any time in respect of the insurance, e.g. if the insurance is retrospective, a return of the premium is not due merely because the property had suffered destruction before the request for insurance was granted; a person insured against injury through war risks would not be entitled to a return of his premium on the grounds that the war had discontinued before he arrived in the zone of the military operations, since the insurers ran the risk of the war continuing indefinitely.

RETURN (PARTIAL)

The insured may be entitled to a return of a part of the premium in the following circumstances—

1. **Where the Insurers were Never Wholly at Risk.** In an insurance against employers' liability or other liability, where the premium is based upon the wages or the number of workmen employed, the insured, unless otherwise stipulated, may be entitled to a return of premium if the actual wages or number of workmen proves to be less than the amount or number upon which premium has been paid (the question of such a return is usually, however, dealt with in the policy).

In an over-insurance on property, a partial return may be payable, for the insurers cannot be liable for more than the value of the property.

2. **By the Exercise of a Term of the Contract.** The policy may stipulate that the insured or the insurers may determine the policy upon due notice, and that in such event a part of the premium will be returned; or that a return of premium will be made in certain circumstances, e.g. if the claims do not exceed a certain amount or if the risk be diminished.

3. **By Agreement.** Where it transpires that the insured is doubly protected against the same risk, the insured and one or both insurers may come to terms as to the remission of premium.

Where the risk has ceased, the insurers may agree to return part of the premium, or hold it towards reduction of premium on a new contract.

4. **By Operation of Law.** If a company goes into liquidation during the term of the policy, the insured may be entitled to prove in the liquidation for the unexpired value of the insurance.

INSURED'S RIGHT TO A RETURN

The insured's right to a return of premium is based upon a total or partial failure of consideration, not the mere fact that the insured cannot secure or loses the benefit of his contract. It is, therefore, not a case of failure of consideration where the insured fails to recover by reason of a breach of a condition subsequent of the policy or a condition precedent to the liability of the insurers, e.g. alteration of risk or failure to notify a loss in due time; or where the policy still has part of its term current after the total destruction of the subject-matter.

Notwithstanding failure of consideration, the right to a return of premium fails in two cases, viz.—

1. Where the insured has been fraudulent.
2. Where the insurance is illegal to the knowledge of the insured, the risk having come into operation.

In addition, the contract may include in its terms certain stipulations against a return of premium in circumstances which, but for the conditions, might entitle the insured to a return, viz., in the event of over-insurance or misdescription, diminution or alteration of risk; where the insurer relies upon such a condition in the policy, it must be clear that the insured agreed to its terms as part of the contract.

(8) DURATION

The majority of policies of accident insurance are made for a period of twelve months. Some policies, such as burglary, are usually arranged to expire twelve months from the quarter-day following the date of commencement of the insurance, an odd-time charge being made in the premium for the first period of insurance; others are made to run for twelve months from the date of commencement.

There is nothing, however, to prevent an insurance being made for any shorter or longer period. Short period policies for a certain period, or for the duration of a specified event, are very common; and some may be only of a few hours' duration, e.g. transit insurances on goods. Insurances for a period of several years, however, are not frequently met with in Great Britain.

The duration of the insurance is a necessary term of the contract, and, until it is fixed, the contract is not concluded; but it would appear that where the period is not defined, e.g. where temporary cover is issued without stipulation as to its duration, the insurance will continue for a reasonable time.

COMMENCEMENT

Unless otherwise expressed, the insurance commences and the insurers become liable from the date of acceptance, whether or not the premium has been paid.

The date of commencement of the policy may, however, be post-dated or pre-dated, and is then a matter to be ascertained from the negotiations between the parties and the language of the policy. Sometimes it may be made a special condition of the policy that the insurers shall not become liable until the fulfilment of a certain requirement, e.g. payment of the premium; but in such event the *insurance* commences from the date the contract is made, even though the insured cannot *claim* thereunder for any loss arising before he has fulfilled the condition.

DURATION AND TERMINATION

The policy usually defines the precise period during which the insurance will continue, but under certain circumstances the contract may be determined or cease to be effective, viz.—

Cancellation. The policy may include conditions giving the insured and/or the insurers the right to terminate the insurance during its currency, with a return of premium to the insured. Where such conditions are embodied, the usual provisions are—

As regards the insured, that he may cancel the policy forthwith at any time, and demand of the insurers the balance of premium which remains after a charge has been made on the basis of the scale of short period rates which the insurers apply to the particular class of insurance.

As regards the insurers, that they may cancel the policy under certain conditions, e.g. alteration of risk or assignment of the subject-matter; or unconditionally upon return to the insured of a proportionate part of the premium for the unexpired term.

In the case of cancellation by the insured, the insurance ceases from the time specified by him, and he cannot claim for a subsequent loss even though the return of premium has not been made.

If the insurers cancel the policy, it ceases to be in force when they have complied with the terms of the condition, e.g. after giving the prescribed notice (usually seven days) and paying the return of premium.

Apart from, or in the absence of, conditions, the insured and the insurers may terminate the policy at any time by agreement.

Breach of Contract. The breach of a condition precedent of the policy renders the contract voidable (see page 42). If such right is exercised, the insurance is determined from the commencement, i.e. the insurance never commences to run, notwithstanding the occurrence of a loss before the breach is discovered.

The breach of a condition subsequent of the policy renders the contract voidable at the date of breach, i.e. entitles the insurers to determine the policy at such date and free themselves from liability for subsequent losses.

Breach of a condition precedent to the liability of the insurers does

not affect the currency of the policy; the policy remains in force, and the breach affects only the loss in respect of which it occurred.

Payment of the Sum Insured. Where a policy contains a "sum insured," e.g. burglary, or a limit to the amount for which the insurers will be liable during the period of insurance, then upon its exhaustion, whether by one loss or a series of losses, the insurance terminates.

Some policies, e.g. public liability and employers' liability, are issued without restriction as to the amount of the insurers' liability during the period of insurance.

Assignment or Destruction of Subject-matter. In the event of total assignment (see p. 47) or destruction of the subject-matter of the insurance, the insurable interest of the policyholder therein automatically ceases to exist. The consequent effect normally is that the insurance is no longer effective and the contract terminates.

Consideration has to be given, however, in this connection to the fact that certain contracts may contain terms or extensions causing a variation of this position. When effecting the insurance the parties may, for instance, have agreed that when such a situation arises the insured shall be entitled to substitute a new subject-matter.

If a motor policy indemnifies the insured, not only in respect of the car described in the policy, but also whilst driving any other car not belonging to him, the sale or destruction of the insured car may in certain circumstances terminate the policy (*Tattersall* v. *Drysdale*). It has to be determined from the terms of the policy whether the indemnity when driving other cars is an *extension* contingent upon the existence of the insured's interest in a specified car or, on the other hand, an independent section of the contract of insurance.

Liquidation. If an insurance company goes into liquidation, the insurance is no longer effective, and the insured is merely a creditor (1) for the value of the policy at the date of liquidation and (2) for any unpaid loss which occurred prior thereto.

In the case of personal accident and motor policies, statutory provision is made under the Assurance Companies Act, 1909 (extended by Road Traffic Act, 1930), that the value of the policy shall be a proportionate part of the premium, and no account is taken of any loss happening during the liquidation.

Where the Act does not apply, e.g. burglary and public liability policies, no strict rule has been established as to how the value of the policy should be assessed. Generally speaking, such value would be a proportionate part of the premium, but it might be contended that the value was equal to the cost of insuring elsewhere for the unexpired term; or, if a loss occurred during the liquidation, that the value of the policy was represented by the amount of such loss. As, in practice, immediate arrangements are generally made to insure elsewhere, the latter contention is hardly likely to arise.

RENEWAL

Contracts of accident insurance including fidelity guarantee may for this purpose be divided into four main classes—

(*a*) Non-renewable. (*b*) Renewable.
(*c*) Long Term. (*d*) Continuing.

(*a*) Non-renewable. Many policies are issued for short periods of so many days, weeks or months according to the requirements of the policyholder, e.g. a motor policy for a month's hire of a car, and further insurance after lapse is usually dealt with by a new policy. Other contracts may be dependent on an event, either definite as to time such as a third party insurance for a fete or sports meeting, or indefinite such as an administrator's or liquidator's bond.

(*b*) Renewable. The majority of accident contracts issued on an annual basis are expressed as being renewable for further annual periods by mutual consent, by the insured paying and the insurers accepting the renewal premium, e.g. burglary, motor, personal accident, employers' liability, "commercial" guarantees, etc. The insurers usually issue a renewal notice shortly before the due date advising the amount of the renewal premium and a renewal receipt upon payment.

(*c*) Long Term. Some policies are issued for a period of three or five years, subject to the payment of an annual premium, from which a discount is allowed in consideration of the "long term." The usual terms of the policy are that the insurers are bound to insure for the full term of the contract, subject to any reservation of liability thereunder if the premium be unpaid; the insured on his part is bound to pay each premium falling due. Many policies of this nature are effected by Public Authorities. Some "Long Term" policies are expressed as being renewable for further like periods. There is, of course, nothing to prevent the issue of contracts for much longer periods than three or five years, e.g. permanent sickness policies.

(*d*) Continuing. Some contracts under which an annual premium is payable continue indefinitely until an event occurs or some action is taken by one or other party to terminate; e.g. a customs bond for entertainment duty, which is continuous from year to year unless the person guaranteed fails to pay the premium when due or the insurers give one month's notice of termination.

Whilst the bulk of accident business is covered by the above classification there is scope for infinite variety, and regard must therefore be paid to the actual language of the policy. The procedure at Lloyd's, moreover, with annual policies is somewhat different from that of the companies, though in effect the result is very much the same.

Renewable Policies. An annual policy which is intended to be continued from year to year is normally expressed as an insurance for the specific period for which the first premium has been paid and for any subsequent period for which the insured shall pay and the company shall agree to accept a renewal premium. If the insured pays and the company accepts a further premium accordingly, the terms of insurance as existing prior to the renewal date are continued for a further year. It is clearly optional to either party, however, to determine the policy, either by the insured failing to pay or the insurer refusing to accept a renewal premium.

In the absence of any specific undertaking there is no duty upon

the insurers to issue a renewal notice, and their failure to do so does not of itself create any legal obligation in respect of matters after the insurance has expired. (*Simpson* v. "*Accidental Death Co.*") Moreover, whilst normally the insurers would give notice prior to the renewal date that they are not prepared to renew, the omission to issue the renewal notice and a refusal to accept the renewal premium when tendered would be equally effective.

The issue of a renewal notice, however, is in effect an offer to renew as well as an intimation that the policy is falling due. Unless the offer is withdrawn in time, the payment by the insured of the renewal premium would bind the insurers.

As regards the first period of an annual policy the duty of disclosure ceases as soon as the insurance is completed. In regard to this duty some doubt has arisen as to whether the renewal of an annual insurance by mutual consent is the making of a new contract or merely a continuance of the original contract. The former would appear to be the correct view ("*Law Accident*" v. *Boyd*), and consequently the duty revives at renewal, rendering it necessary for the insured to reveal any facts which have become material since the insurance was first issued. Equally he would be under a duty to disclose any facts which were not originally disclosed, and which might otherwise have effected the mind of the insurers as regards the continued acceptance of the risk.

An annual policy which is silent on the subject of renewal can equally be continued by mutual consent, e.g. by the insurer inviting renewal and the insurers paying the premium, and for the purposes of disclosure must also be regarded as a new contract.

A breach of condition during the original term of the policy would not in the circumstances affect its validity during the renewed period, unless the breach continues during the latter period, e.g. breach of a condition as to the occupation, use or care of property, or as to the existence of other insurances.

Long Term Policies. A policy issued for a term of, say, five years, under which an annual premium is payable may be regarded as a contract for that term providing for the payment of the premium by instalments. The insurers are bound to the risk for that period, and the insured is usually bound to pay each premium falling due. The duty of disclosure ceases when the policy is first issued, and no duty rests upon the insured to disclose any facts which may subsequently become material. Regard must be paid; however, to the actual language of the policy in order to see whether this position is created, and also to any special stipulations therein which may give one or other or both parties a right to terminate the policy in certain circumstances, e.g. after a claim or non-payment of the premium when due. At one time many "long term" policies were merely annual contracts under which a discount of premium was available so long as the insured duly continued the policy from year to year for the long term period, and some of these contracts may still exist.

A "long term" policy may in similar manner to an annual policy contain provision for renewal for further long terms, in which case the

position of the parties at the commencement of each period—three or five years as the case may be—is identical to that which arises each year under an ordinary annual policy. The renewal is effected by mutual consent and the duty of disclosure is revived.

Continuing Policies. A continuing policy may be subject to payment of premium at varying intervals as may be agreed by the parties in completing the insurance—quarterly, half-yearly, biannually, etc.—but the more common interval is one year, and it is usual to issue a renewal notice as a reminder that a further premium is due. The description is applied to that class of contract which automatically continues unless it is determined in a manner provided for in the contract, e.g. notice by the insurer or the insured. Whilst regard must be paid to the exact terms of the policy the duty of disclosure would not usually revive as each premium is payable, nor would a fresh contract be created. Failing determination by notice or otherwise as stipulated in the policy, the parties would be bound to the continuance of the original contract until it comes to an end of itself, e.g. by cessation of the risk on which the contract is based.

Days of Grace

In certain classes of accident insurance, it is the practice of most insurance companies to allow "days of grace" in respect of the renewal of annual policies where neither party is bound to renew.

In the absence of days of grace, the insurance ceases at the expiry date, and, if it is to be continued, it must be renewed at or before the expiry date.

The stipulation as regards "days of grace" may be expressed either in the policy or in the renewal notice, and usually allows the insured fifteen days after the expiry date in which to pay his premium.

The effect of the usual stipulation is that the insurance continues for a further year as from the expiry date if the insurers invite renewal and the insured pays his renewal premium within the fifteen days, notwithstanding that a loss occurs between the expiry date and the date of payment.

A variation of this stipulation occurs in motor insurance, where the renewal notice contains an extension of the expiring period of insurance for fifteen days, but only in respect of liability required to be covered by the Road Traffic Acts. This extension is phrased to operate whether or not the insurance is renewed and unless and until the motor vehicle is insured elsewhere. It is not, therefore, strictly a period of grace during which to pay the renewal premium.

If the insurers are not prepared to renew, their notification to that effect, or their omission to send an invitation to renew would ordinarily terminate their liability at the expiry date, notwithstanding the provision of "days of grace" in the policy. (*Simpson* v. "*Accidental Death Co.*")

The insurers may, however, be prepared to continue the insurance on different terms, in which case their position in regard to days of grace depends on the manner in which their offer is framed; if it is an

offer to renew the original contract at an increased premium, the days of grace would doubtless apply; but if it is an offer to substitute a new contract, the previous insurance must be considered as at an end at the expiry date.

LAPSE

A policy which is not renewed is said to lapse. It is then open to the parties to revive it, either by the insurers sending a further request for the renewal premium, or by the insured tendering the renewal premium; but the revival is a new contract.

It is usual to ante-date the revived insurance to the last expiry date, but if any loss has occurred in the interim, the insurers would not become liable unless they so intended, and their intention must be clearly shown. The occurrence of such a loss would be a material fact which should be disclosed to the insurers, and the acceptance of the renewal premium in ignorance of the loss would not be sufficient proof of intention of the insurers to meet a loss which had occurred between expiry date and date of payment of premium.

(9) LLOYD'S POLICIES

Lloyd's is an association of "underwriters," originally formed for the purpose of transacting marine insurance, but whose operations now embrace practically all classes of insurance business.

The difference in insuring at Lloyd's lies, not so much in the contract of insurance, but in their methods of business. The contract itself is governed by the general principles of the law of insurance, but long usage has established a very distinct difference in the way of making the contract.

The main point of difference is in the liability undertaken by each underwriter. When insuring with a limited company or other association, the insured contracts with a corporation—a legal entity—whose whole assets become liable for the satisfaction of claims under the contract. Underwriters frequently combine together in definite groups for purposes of convenience, but they only undertake liability *each for his own part and not one for another*. The policy for a particular risk accepted by underwriters would usually show the names of several underwriters or groups of underwriters, and against each of these names the fractional part of the risk undertaken by each underwriter, and there may be a considerable variation in these fractions. Each underwriter becomes liable only for his particular fraction, and is not concerned with the inability or refusal of the other underwriters to pay their proportion.

Theoretically, therefore, the insured who is unable to obtain payment has to enforce the contract by a series of separate actions corresponding to the number of underwriters; in practice, an action would be brought against the leading name in the policy, and the remainder would generally follow the result of this initial action. In the event of the inability of one underwriter to meet his losses, however, there is no obligation on the others to make up his deficit.

Contracts of insurance are made at Lloyd's only through the medium of Lloyd's "brokers," who are individuals or firms specially sanctioned by Lloyd's to act as their agents for this purpose, and who may even themselves be underwriters.

Brokers do business either directly with the public or through the medium of other agents; but, by virtue of Lloyd's custom in making contracts, underwriters do not come into direct contact with either the public or ordinary agents. Moreover, as a rule, the broker carries out practically the whole of the work which arises out of the insurance, such as the writing of the policy, collection of premium, settlement of claims, etc. When the policy is effected, however, there is privity of contract between the insured and the underwriter; the insured is not bound by the customs of Lloyd's, unless it can be shown that he has agreed to deal with them in accordance with their customs or has assented to be bound thereby.

Business is transacted at Lloyd's by means of a document known as a "slip." On the slip are noted all the necessary details of the insurance, e.g. name of proposer, subject-matter, amount and duration of insurance, perils to be covered, material facts, etc., to enable the underwriter to estimate the risk, fix the premium, and determine the proportion he is individually prepared to undertake. In many classes of accident insurance, the slip is supplemented by a form of proposal containing a disclosure of such further information as is regarded as necessary for the particular form of insurance. The slip made out by the broker is taken by him to the underwriter or to a series of underwriters, who each initials it for the proportion or amount of risk he is prepared to undertake for himself or for the group of underwriters whom he represents. The risk is not fully placed, therefore, until there are sufficient initials of underwriters with their proportions or amounts to make a complete whole.

The contract with each underwriter is made when the slip is initialed. (*Thompson* v. *Adams*.) The slip, therefore, takes the place of both the proposal and the cover-note utilized by insurance companies. The slip is deemed to embody the terms and conditions of the common form of Lloyd's policy for the insurance to which the slip relates, and with the exception of marine insurance the contract can be enforced by an action on the slip. The actual signing and issue of a policy, therefore, is a mere formality (*Thompson* v. *Adams*); so much so, in fact, that the signing of a policy which does not correspond with the slip cannot be construed as a waiver so as to preclude the underwriter from relying on the contract as contained in the slip.

By the custom of Lloyd's, the underwriter looks only to the broker for payment of the premium, and the date of payment is deemed to be the date on which the slip was initialed. The broker is bound to pay, whether or not he has received the money from the insured. The insured, therefore, becomes liable to the broker, not to the underwriter, for the payment of the premium, and can be compelled to pay whether or not the broker has paid the underwriter. Moreover, the policy, when signed by the underwriter, acknowledges the premium and, by virtue

of the above circumstances, the insured can enforce the contract against the underwriter, whether or not he has, in fact, paid the premium. (*Hambro* v. *Burnand.*)

In order to grasp more readily the application of Principles to Practice, readers are strongly advised, when reading the text, to refer forthwith to the Alphabetical Appendixes when cases or statutes are quoted.

CHAPTER IV

THE EVENT

GENERAL aspects—Occurrence of the event—Onus of proof

For Cases and Statutes cited herein, see Appendixes

(1) GENERAL ASPECTS

THE nature of the event which may form the basis of a contract of insurance is dealt with in Chapter II, together with a classification of the events which form the subject of policies of accident insurance, and a description of the types of contract which are made in respect of such events.

The events which may give rise to such contracts are either everyday perils which arise from the normal risks of civilized life (e.g. burglary, personal accident, etc.), or special perils which are in the nature of a national calamity.

Whilst the insurers may be prepared to grant protection in respect of various perils, it will generally be found that in each different class of policy provision is made whereby, in certain special circumstances, the happening of the peril is not to give rise to the liability of the insurers. A policy, therefore, usually specifies the peril out of which loss may be incurred by the insured in respect of the subject-matter of the policy, and then sets forth what are known as the "exceptions," or the circumstances which will cause the policy to fail to operate, notwithstanding the occurrence of the peril.

Whether, therefore, the event which occurs is the event for which insurance is provided depends on—

1. *The Peril.* Whether the nature of the peril answers to the description in the policy.

2. *The Exceptions.* Whether the peril comes into operation under circumstances which are excepted from the policy.

THE PERIL

The peril is usually described in different types of policies in general words which are construed in accordance with their ordinary meaning, thus—

(*a*) **Burglary.** Loss or damage by burglary, housebreaking, larceny, theft, or any attempt thereat.

(*b*) **Personal Accident.** Death or injury by violent, accidental, external, and visible means.

(*c*) **Public Liability.** Death of or injury to third persons or damage to their property.

EXCEPTIONS

The exceptions which may cause the peril to fail to become the event to which the insurance will apply may be—

1. Circumstances of national calamity which may materially increase the possibility of the peril, and which consequently make the risk of the insurers entirely disproportionate to that which they purposed to incur; e.g. earthquake, war, invasion, riot, civil commotion, or internal rebellion. Where such circumstances are excepted in an ordinary class of policy, it may be that certain of them can form the subject of insurance under special policies.

2. Circumstances which in the absence of the explanatory words of the exception might be construed as falling within the general description of the peril, or from which, in the absence of the exception, ambiguity or doubt might arise as to the events which it is intended shall be the subject of insurance. Such exceptions are sometimes unnecessary to the construction of the contract, but are inserted *ex abundanti cautela*, i.e. to put the matter beyond doubt.

3. Circumstances in which it is within the control of the insured, or of persons acting on his behalf, to prevent the occurrence of the peril, e.g. wilful acts or criminal misconduct (*Tinline* v. "*White Cross*"); or circumstances which unduly lend themselves to the occurrence of the peril; e.g. (personal accident insurance) wilful exposure to obvious risk, motor-cycling, mountaineering, etc.

4. Circumstances by reason of which the peril should form the subject of a different class of insurance; e.g. under a plate-glass policy, the exception of breakage of glass caused by fire. (*Marsden* v. "*City & County*.")

5. The existence of other insurances which more specifically may be intended to answer for the peril which occurs. (A stipulation might also appear that the existence of other insurances would restrict instead of exclude the insured's right to claim—see Contribution, page 80.)

(2) OCCURRENCE OF THE EVENT

In order to be in a position to claim, the insured must be able to show—

1. That he has sustained a loss; and, unless otherwise expressed,
2. That the event causing the loss occurred during the period of insurance.

If there is no proof that the property which he alleges was lost or damaged was in existence, or no evidence of injury, his claim clearly fails.

He is also under certain duties as to notification, assistance, arbitration, etc., which will govern his right to enforce the claim (see Conditions, page 73).

Even then, however, it must also be established that the cause of loss was the event in respect of which he insured, i.e. that the cause of loss—

(*a*) Answers to the description of the peril described in the policy.

(*b*) Does not fall within the operation of an exception of the policy.

PROXIMATE CAUSE

In order that the policy may operate, it is necessary that there should be a clear relationship of cause and effect between the event and the loss sustained. (*Becker Gray & Co.* v. "*London.*")

There are cases where an excepted peril may exist, and indirectly cause the loss by producing the opportunity for it to arise; e.g. where property is stolen during the excitement of a fire. (*Marsden* v. "*City & County.*") Again, there are cases where the loss is caused by the joint operation of the insured peril and another peril, or where another peril may arise as a direct consequence of the insured peril. (*Isitt* v. "*Railway Passengers.*")

The insured generally has to establish that the insured peril is the proximate cause—*causa causans*—of loss as distinct from the remote cause—*causa sine qua non*—the principle being that it is the intention of the parties to have regard only to the proximate cause, unless the policy shows it intended to provide for even the remote consequences of the insured peril.

However, this principle must be broadly interpreted. For every event which occurs in this world there is a succession or a confluence of causes which may directly or indirectly lead up to the event. The event of a person's death can be traced back through a variety of causes to the event of his birth, in that, if he had never been born, he could never have died. (*Lawrence* v. *Accidental Insurance Co.*) The extent to which various causes may be regarded or disregarded in determining the proximate cause therefore becomes very material; and what constitutes the proximate cause, moreover, must be considered in relation to whether it is to be applied to—

1. The peril, i.e. the cause of loss, to which the insurance applies.
2. The exception, i.e. excluded cause, which may have given rise to the insured peril.

PROXIMATE CAUSE—THE PERIL

So far as the insured peril is concerned, the rules for determining the proximate cause are broadly as follows—

(*a*) **Immediate Operation.** The insured peril is the proximate cause where the loss results from its immediate operation; e.g. if property insured under a fire policy is destroyed by fire. There is then no occasion to inquire into preceding causes unless the question of an exception arises.

Loss incurred in anticipation of the insured peril, however, is not covered; e.g. if a ship's cargo insured against enemy capture is detained in port by the master for fear of capture and sold at a loss; though the loss would be covered where the peril has commenced to operate, e.g. where the cargo is thrown overboard when capture is about to occur, to prevent it from falling into the enemy's hands.

(*b*) **Concurrent Operation.** The insured peril is the proximate cause,

even though other causes act concurrently with it to produce the loss. In such cases the concurrent cause or causes can be disregarded unless they form the subject of an exception in the policy. Examples—

Where a person faints when bathing and is drowned, owing to immersion whilst unconscious in shallow water, the cause of death is drowning, even though, but for fainting, the person would not have been drowned. This, however, must be distinguished from a case where, owing to the unusual exertion of swimming, a person dies from heart disease and sinks in the water; death does not result from drowning, but from heart disease.

An explosion occurs on board a ship during bad weather at sea, and owing to its disablement the ship is lost; the loss is caused by the perils of the sea, even though, but for the explosion, the ship would have been able to weather the storm.

A person subject to heart disease meets with an accident, and the combined effects of his feeble state of health and his injuries result in death; the cause of death is accident, notwithstanding that a person in normal health would have recovered from such injuries.

(*c*) **Direct Chain.** The insured peril is the proximate cause where, though the loss is not the immediate result of the peril, there is yet an uninterrupted chain of circumstances which lead directly and naturally from the operation of the peril to the occurrence of the loss, to such effect that the loss is the reasonable and probable consequence of the peril. (*Isitt* v. "*Railway Passengers.*") Examples—

A person insured against death by accident falls whilst mountaineering and, owing to long exposure in bad weather before he is rescued, catches a chill, which develops into pneumonia, from which he dies.

A person, likewise insured, accidentally breaks a limb, and dies under anaesthetic whilst undergoing a surgical operation rendered necessary by the injury.

A person, likewise insured, accidentally sustains a scratch, producing septicaemia, from which follows septic pneumonia with fatal results.

A person insured for fatal injury caused by a motor car sustains serious head injuries in a motoring accident, and through the shock of wandering into a stream thereafter in a semi-conscious condition dies from heart failure. (*Smith* v. "*Cornhill.*")

In each case there is a direct relationship between cause and effect; the accident is the proximate cause, though the immediate cause may be disease or other event.

(*d*) **Interruption.** Conversely, the insured peril is not the proximate cause where there is an interruption in the chain of circumstances, whereby the intervening event which directly or ultimately produces the loss is not the direct and natural result of the insured peril. Examples—

Where a person is injured in a railway accident and subsequently, owing to his consequent lack of agility, is killed in a street accident which in proper health he could have readily avoided, the railway accident is not the proximate cause of his death.

Where glass in shop fronts or windows is cracked by fire, or broken

in efforts to extinguish the fire, the proximate cause is fire; but not so where the glass is broken by an unruly mob which collects to see the fire, notwithstanding that, but for the fire, they would never have assembled. (*Marsden* v. "*City & County*.")

In the above cases the railway accident and the fire are causes which contribute towards the possibility of the ultimate loss, but the intervening cause of the loss is not the reasonable or probable result of the original event.

Proximate Cause—The Exceptions

In determining the effect of the exceptions where a loss is proximately caused by the insured peril, it is necessary to have particular regard to the language used, as in many instances the policy is so expressed as to be inoperative not only where the expected peril is the proximate cause of the loss, but also where the loss is the remote consequence thereof.

Thus, where a burglary policy excludes loss directly *or indirectly* occurring during or in consequence of a riot, the theft of goods from premises adjacent to the scene of a riot is outside the policy, even though the theft is committed by burglars unconnected with the rioters, but who merely use the opportunity created by the consequent distraction.

Where the intention is to exclude only the direct and not the remote consequences, the doctrine of proximate cause applies, and the rules are broadly as follows—

(*a*) **Concurrent but Unrelated Causes.** Where the insured peril and the excepted cause, though acting concurrently, produce clearly distinguishable consequences, the consequences of the insured peril are covered by the policy, and the excepted cause does not operate. Conversely, the consequences of the excepted cause are not covered by the policy. Examples—

Where a personal accident insurance excludes death by heart disease, the policy applies if the insured is killed outright in a street accident, notwithstanding that it is shown he had been suffering from heart trouble.

On the other hand, where a person, whilst laid up owing to injuries by accident, dies from an infectious disease which is in no way attributable to the accident, the cause of death is not accident but disease.

(*b*) **Concurrent and Related Causes.** Where the insured peril and the excepted peril act concurrently to produce the loss, the exception operates, and the loss is not covered by the policy. Example—

Where the contents of premises are pillaged by rioters during a riot.

(*c*) **Direct Chain from Excepted Cause.** Where the insured peril is the reasonable and probable consequence of the excepted cause, whereby the excepted cause leads directly and naturally to the occurrence of a loss by operation of the insured peril, the exception operates and the loss is not covered by the policy. Examples—

Where during a riot the mob deliberately sets fire to public property.

Where an inexperienced person insured under a personal accident

policy which excludes exposure to obvious risk, tries to walk a tight rope for a wager and is consequently injured.

(*d*) **Interruption of** (*c*). Conversely, where the insured peril is not the reasonable and probable consequence of the excepted cause, but is an intervening event, the exception does not operate, even though but for the excepted cause the insured peril might not have arisen. Examples—

Where a burglary occurs in a certain district whilst the police have been withdrawn to cope with a riot in a different locality, the riot is not the cause of loss.

Where a plate-glass policy excludes damage by fire, the exception does not operate to exclude breakage of glass on adjacent premises by a mob which has assembled to see the fire. (*Marsden* v. "*City & County.*")

(*e*) **Direct Chain from Insured Peril.** Where the excepted cause is the reasonable and probable consequence of the insured peril, whereby the insured peril leads directly and naturally to the occurrence of a loss by the operation of the excepted cause, the exception does *not* operate, as it is merely a link in the chain of circumstances as the result of which the insured peril is the proximate cause; e.g.—

Where under a personal accident policy which excludes death by disease, the insured dies from pneumonia as a result of exposure following an accident in the hunting field.

(*f*) **Interruption of** (*e*). Conversely, if the excepted cause which produces the loss is not a link in the chain of circumstances, the exception operates; e.g.—

Where a person laid up through accident dies from an infectious disease which is not attributable to the accident.

The Time of the Event

In order that the loss may fall under the policy, the *event* must ordinarily take place during the period of insurance.

Under the doctrine of proximate cause, it has been indicated that the insured event need not be the immediate cause of the loss; the policy equally applies if the immediate cause of loss is the last of a series of successive causes which lead directly and naturally to the loss. The time of the *event* and the time of the *loss* are, therefore, not always simultaneous; e.g. where a man meets with an accident in the hunting field, catches a chill through exposure and develops pneumonia from which subsequently he dies. (*Isitt* v. "*Railway Passengers.*")

It follows that where the event occurs before commencement of the insurance, a loss which happens during the period of insurance is not covered; e.g. if in the above instance, the accident occurred before and the death occurred after the commencing date.

There may be cases, however, where the event is a continuous peril, which has commenced before the insurance and continued during its currency. Provided there is no concealment on the part of the insured, the policy would in such instances cover loss which resulted from

the operation of the peril during the period of insurance; e.g. if a policy commenced at 12 noon on a certain date, and a fire, which commenced on neighbouring premises before 12 noon, did not spread to the insured premises until after that time.

If the continuous event caused loss partly before and partly after the commencement of insurance, it is presumed that the insured would be able to recover that part of the loss which occurred in the period of insurance, if it could be apportioned.

It also follows that where the event occurs before the expiry of the insurance, it is immaterial that it is not discovered, or its effect is not known until after expiry. Moreover, where the event occurs before expiry, the policy applies notwithstanding that the loss occurs after expiry; e.g. where a person insured against accidents is not immediately killed, but dies some weeks afterwards as a result of the accident.

In applying these principles, however, due regard must be paid to the terms of the policy. The policy may be expressed to cover *loss* discovered during its currency, instead of loss which results from *events* which occur during that period; or may limit the period after expiry or after the event during which loss may be discovered.

It is also necessary to distinguish as to which is the insured event. Under a life policy the event is death; under a personal accident policy, the event is an accident, from which death may result; under a live stock policy, the event may be the death of the animal; and if this occurs after expiry, the loss is not covered, even though the accident which proximately caused death occurred before expiry.

(3) ONUS OF PROOF

The three factors affecting the validity of a claim which have been the subject of this chapter are—

(*a*) The occurrence of the event.
(*b*) The operation of an exception.
(*c*) The time of the event.

The onus lies *upon the insured* to prove that the cause of the loss was the event which is described in the policy. Proof cannot always be a matter of certainty, and the insured has sufficiently discharged his duty by establishing facts from which it is reasonable to draw the inference that the event has occurred. (*Nobel's Explosive Co.* v. "*British Dominions.*") He does not fail merely because the facts are equally consistent with another event, e.g. if the insured is found dead in circumstances which point either to accident or to suicide. Mere surmise, however, is not sufficient, e.g. the fact that goods have been lost from a warehouse does not prove by itself that they have been stolen by housebreaking.

Where it has thus been established that the loss was the result of the insured peril, the policy operates unless it can be established by the insurers that the loss arose under an exception, i.e. the onus lies upon the insurers to prove the exception. (*Tootal, Broadhurst* v. "*London & Lancashire.*") Here, again, certainty cannot always be

established, but it becomes a question of inference as to what conclusion it is reasonable to draw from the facts submitted, e.g. if loss during riot or civil commotion is excluded from the insurance, it is sufficient that the insurers are able to establish facts from which it is proper and reasonable to draw the inference that the property was stolen by the turbulent forces and not by ordinary thieves.

It is possible, however, for the insurers to use such words in the policy as will shift to the insured the onus of proof, and make it his duty to establish that an exception does not operate. (*Levy* v. *Assicurazioni Generali.*) Particularly is this attempted where the policy contains an exception against riot, civil commotion, and other special perils which might give rise to the insured event.

The onus of proving the time of the event lies upon the insured. This again cannot always be definitely established, and is sometimes a matter of reasonable inference from the facts submitted.

In order to grasp more readily the application of Principles to Practice, readers are strongly advised, when reading the text, to refer forthwith to the Alphabetical Appendixes when cases or statutes are quoted.

CHAPTER V

THE CLAIM

CONDITIONS—Amount—Contribution—Subrogation—Proceedings—Settlement

For Cases and Statutes cited herein, see Appendixes

(1) CONDITIONS

IN the previous chapter it has been shown that, in order that the insurers may be answerable for a loss and, therefore, liable to make a payment under the policy, it must be established—

1. That the insured has sustained a loss.
2. That the loss arose out of the event which is described in the policy.
3. That the loss does not fall within an exception of the policy.
4. That the event occurred during the period of insurance.

Over and beyond these requirements, the insured must have observed and/or must fulfil all conditions precedent or subsequent which are imposed upon him either at common law or by the terms of the policy.

It has been shown in Chapter III that the breach of a condition may have the effect—according to the nature of the condition—either of avoiding the policy, or of nullifying the right to claim for a particular loss; and that the breach of a condition may be waived by the insurers orally, or in writing, or by conduct. In the same chapter are set forth the chief conditions which are implied or expressed in contracts of insurance.

The principal matters with which the insured and insurers are ordinarily concerned in the event of loss are—

(*a*) Notification of loss.
(*b*) Particulars and proofs thereof.
(*c*) Good faith.

NOTIFICATION

A policy generally contains a condition relating to notification of the occurrence giving rise to a loss and of claims arising out of the occurrence. The terms of the condition vary according to the intentions of different insurers and to the requirements of the class of policy. The two aspects of the condition which have to be considered are—

1. Method of notice. 2. Time of notice.

Method. It may be found that the condition contains some or all of the following stipulations—

(*a*) That the notice shall be in writing;

(*b*) That it shall be given personally by the insured or by his personal representatives; and

(*c*) That it must be given personally to the insurers.

The condition is not then fulfilled unless and until these requirements are observed.

Unless such stipulations are made, however, (*a*) the notice need not be in writing—oral notice would be sufficient; (*b*) it need not be given personally—an agent or other person acting on the insured's behalf could give it, or even the fact that the occurrence or claim came to the insurer's knowledge might constitute notice; and (*c*) it need not be personally received by the insurers—advice could be given to the agent who transacted the insurance, even though he had ceased to continue to act for the insurers. (*Marsden* v. "*City & County.*")

Where the insurers must personally be advised, it is sufficient if the agent is notified, provided he duly transmits the notice to the insurers, but in such case the insured takes the risk of the agent's omission.

Time. The condition might be found to contain a definite time limit for giving notice; if not, it would probably stipulate that notice must be given "immediately" or "as soon as possible."

If the condition contains a definite time limit, failure to notify within the time limit, however caused, relieves the insurers.

A similar position arises if the notice is not given "immediately" or as soon as possible," but these terms are given a fairly wide meaning; e.g. it has been held that notice two months after accident was "immediate" where it was given as soon as the seriousness of the accident was realized (personal accident insurance).

Whether the stipulation as to time is a condition, i.e. a "condition precedent," is a question of construction of the policy; if it is not, the insurers are not relieved of liability by the insured's failure to comply with the stipulation, but may have a right in damages for loss caused to them by any delay. (*In re Coleman's Depositories Ltd. and* "*Life and Health.*")

In the absence of a condition it is doubtful whether the insured is under an obligation to give notice of loss within any particular time (*In re Coleman's Depositories above*) but as otherwise the insurers are deprived of opportunity to investigate the loss and protect their interests, the condition is almost invariably contained in the policy in some form or other.

PARTICULARS

The insured is not under any implied obligation to provide the insurers with the details and circumstances of the loss, and cannot be compelled to do so until such particulars are called for in the course of proceedings where litigation ensues. It is, therefore, generally made a condition precedent to liability that particulars should be furnished. This condition, again, may stipulate both as to (*a*) method and (*b*) time of giving particulars.

Method. As to method, the condition generally stipulates that a claim form, furnished by the insurers and calling for details as to the

time, nature, circumstances, and amount of loss, shall be fully completed. It would also probably stipulate that the details therein and such further details as the insurers may reasonably require must be given as fully as practicable. Whether such details are sufficiently given is a question of opinion, dependent upon the information available to the insured.

If information reasonably required by the insurers is withheld by the insured the claim may fail owing to the breach of condition even if such information of itself contains no material which justifies a repudiation of the claim. (*Welch* v. "*Royal Exchange.*")

Time. As to time, the condition might stipulate a definite time limit or "as soon as possible" Failure to observe the time limit would relieve the insurers, but an extension of time might be granted at the will of the insurers. (*In re Carr and Sun Fire Office.*)

A repudiation of liability before the particulars are due relieves the insured from the obligation of giving particulars, even though the insurers, when repudiating, ask for particulars. After delivery of particulars, however, the insurers are at liberty—if repudiating generally—to set forth amongst other grounds for repudiation the fact that particulars were delivered out of time.

Unless so provided, the insured is not prevented by delivery of particulars from bringing a further claim for the same occurrence; e.g. where he has by oversight or ignorance omitted part of his claim. (*Prosser* v. "*Lancashire & Yorkshire.*") Unless, therefore, the insurers have obtained at the time of the settlement of the first claim a complete discharge in respect of their liability in connection with the occurrence, the insured could claim again. Thus, if under a motor policy further damage is discovered some time after a claim for the original repairs, the insurers might still be liable.

Proofs

In policies where proof is essential, it is also generally made a condition precedent of liability that the insured can be called upon to provide, in amplification of the particulars, such documentary or other proofs, and to furnish other assistance as will to the satisfaction of the insurers enable them to verify the loss. Whether the insured has duly fulfilled the condition is a matter for determination according to the circumstances. Reasonable effort on his part is all that is due; the insurers are not entitled to construe the condition unfairly, and must accept particulars which would in all the circumstances satisfy a reasonable person.

Good Faith

It is an implied condition subsequent of the policy that the insured will not make a fraudulent claim; many policies contain an express condition to that effect. The effect of a breach of this condition is, therefore, not only to cancel the insured's right of claim for the particular occurrence, but also to avoid the policy.

The obligation lies upon the insurers to prove fraud, and to do so they must show—

1. That statements of fact given in support of the claim were false.
2. That the statements were made by the insured.
3. That he made them (*a*) knowing them to be false; or (*b*) not believing them to be true; or (*c*) recklessly, not caring whether they were true or false.

Fraud may arise from the fact that no loss occurred, or that the loss did not arise from the insured peril, or that the amount of loss is grossly exaggerated. To determine whether a claim is fraudulent is often a matter of considerable difficulty, and it is frequently even more difficult to prove fraud to the satisfaction of a jury. Mistake might quite honestly be made as to the fact that a loss had actually occurred, or that loss which had arisen had been caused by a particular peril. Exaggeration of the extent of loss is frequently encountered, and here again there may be no fraudulent intention, but merely a mistaken knowledge as to the extent of loss, or a difference of opinion as to its amount. Fraud in such cases is a matter of inference, dependent upon it being shown that there was a clear intention to defraud, or that the amount claimed is so excessive as to raise an implication of a fraudulent intention. (*Ewer* v. "*National Employers.*")

Waiver

In connection with motor insurance Section 38 of the Road Traffic Act, 1930, and Section 12 of the Road Traffic Act, 1934, nullify certain "conditions" in so far as concerns the rights of third parties to obtain compensation for injuries within the scope of the Acts.

(2) AMOUNT

Sum Insured

The term "sum insured," i.e. amount of insurance, is frequently but often inaccurately used in reference to the indemnities provided under contracts of accident insurance, and, therefore, it is desirable to draw attention to what normally constitutes "sum insured" in the principal classes of insurance, viz.—

Burglary. The policy states the amount of insurance available in the period of the policy. This amount is sometimes subdivided and allocated to the various items of property insured.

Employers' Liability. The amount of insurance is unlimited.

Liability. The amount of insurance is either unlimited, or certain limits are stated in the policy in respect of (*a*) each claim; or (*b*) each occurrence; or (*c*) the period of insurance.

Motor. (1) Liability (as above). (2) Loss of or damage to the vehicle. The amount is unlimited in the period of insurance.

Fidelity and Solvency. The policy states the amount of insurance in respect of a particular event, or a particular person, and/or in the period of insurance.

Personal Accident. The amount of insurance in the period of the policy is often limited to the sum payable in the event of death.

Sum Payable

To determine the "sum payable" to the insured in respect of a particular claim, it is necessary to consider the nature of the particular contract involved.

Personal Accidents. In personal accident insurance the policy sets forth a table of the sums payable upon the occurrence of certain events to the person who is the subject of insurance, such as—

(*a*) Death by accident;
(*b*) Loss of limb or of eyesight;
(*c*) Permanent total disablement;
(*d*) Permanent partial disablement;
(*e*) Temporary total disablement;
(*f*) Temporary partial disablement;

and the amounts sometimes vary according to the nature of the accident causing the injury, e.g. double payment may be agreed for railway accidents.

If the insured or the wife or husband of the insured (also, in Scotland, the son of a male parent insured) is the subject of the insurance, then upon occurrence of the event the sum specified for the particular event is payable. If the subject of the insurance is not one of these, but a person in whom the insured has an insurable interest, then the insured can recover only an indemnity, that is to say, the amount of pecuniary loss as measured at the date of the policy, which would result to him from the occurrence of the event; this amount, however, being limited by the sum stated in the policy as payable for the particular injury or disablement which constitutes the event.

In the absence of limitation in the policy, the payment of a claim for one accident or illness does not prevent the insured from claiming for a further occurrence. (*Prosser* v. "*Lancashire & Yorkshire.*") It is usual, however, to find certain limitations in the policy, e.g.—

(*a*) A limit to the number of weeks for which a weekly payment for disablement will be made.

(*b*) A right to claim only under one section of the table in respect of one particular accident.

(*c*) In the event of payment under a particular item of the table, an exhaustion or limitation of the amount payable under that item to the extent of the sum paid.

(*d*) A limit—up to the amount of the death benefit—of the sum payable for successive claims in the year of insurance.

These limitations affect only successive claims during the period of insurance; upon renewal of the policy a fresh start is made according to the terms upon which the policy is renewed.

Other Classes. Other contracts of accident insurance are contracts of indemnity; the insured, subject to the limits of the policy, is, therefore, able to recover only the pecuniary loss which he has sustained. (*Vance* v. *Forster.*) In the absence of limitations in the policy, an insured who has recovered for one loss is not thereby prevented from

recovering for any subsequent losses, but certain peculiarities of the different classes of insurance might be noted, viz.—

Burglary. Under burglary policies, the amount stated in the policy as the sum insured is the total amount of insurance in the period of the policy. Under the first claim, the insured can recover for the value of the property stolen up to the full amount of the sum insured or, if the amount is subdivided, up to the sum allocated for the particular class of property concerned.

The sum insured, however, becomes reduced by payment of the first claim and, unless it is reinstated by payment of an additional premium, the amount of insurance for subsequent losses is thereby lessened.

This aspect does not affect the loss of specified property, as if it is once stolen beyond recovery the object of the insurance has ceased. It may be material, however, where the insurance covers unspecified property in a specified locus, e.g. goods in a certain warehouse.

Liability. Under liability policies (including the liability sections of driving accident and motor policies) the insurance is unlimited as to the number of claims and the amounts payable, unless the policy specifies certain limits. After settlement of the loss (i.e. compensation to third persons, law costs, etc.) incurred in the first accident, the insurance continues unabated. The insured is, therefore, able to recover for subsequent losses without regard to the fact that he has been paid sums in respect of previous claims.

In practice, each loss is generally settled directly between the insurers and the third person (i.e. the person to whom the insured has become liable for compensation).

Many of these liability policies, however, contain limits as to the liability of the insurers under the policy in respect of the amount payable—

(*a*) To any one third person.

(*b*) In respect of each "occurrence," i.e. an accident or series of accidents arising out of one cause.

(*c*) During the year of insurance.

These limits of insurance are sometimes applied inclusively to the law costs of the third person, as well as to the compensation for his injury or damage.

The position of the company in regard to the law costs incurred by them in the defence of the claim against the insured depends on the language of the policy and the extent to which they have concerned themselves in the claim.

Employers' Liability. Employers' Liability policies are usually unlimited, that is to say, payment for injury to one workman does not preclude the insured from further claims in respect of other workmen, or even the same workman, during the currency of the policy.

Loss or Damage. Policies covering loss of or damage to specified property (other than burglary) are usually unlimited (e.g. motor, driving accident); that is to say, the insurance continues unabated after the occurrence of a claim.

If, however, there is a total loss of the property, e.g. its theft or total destruction, there is nothing left out of which claims may arise and, therefore, the risk of the insurers ceases, even though the policy continues in full force.

Policies of this class frequently mention the value of the property in specifying its description and identification, and stipulate that the sum stated as the value is to be the limit of the insurer's liability for any one occurrence. Unless the value is agreed, this does not signify that the insured can recover this sum in the event of loss—he must prove the amount of his pecuniary loss and can recover only up to that amount, whether the loss be partial or total.

If, however, the insurers do not limit their liability to the sum named as the value in the policy, it is possible for the insured to recover a greater sum if he can prove that the value has been understated.

The agreement of the value appertains only to total losses; in such case the insured and insurers are deemed to arrive at an understanding at the inception of the contract as to the value of the property at any time during the period of insurance, and, in the absence of fraud, this represents the measure of indemnity, and is, therefore, payable if total loss occurs. (*Burnand* v. *Rodocanachi; Lewis* v. *Rucker.*)

Property insurances generally contain an option to reinstate or replace the property lost or destroyed. This is an option available only to the insurers, and does not preclude them from paying the amount of the loss in cash. If they have once elected to reinstate, however, they are bound to do so, irrespective of cost, and cannot withdraw from their election on finding that the cost of reinstatement will exceed the value of the property.

Fidelity. In the case of fidelity insurance, the policy usually makes it clear that the employer can make only one claim in respect of a particular employee, and stipulates that any salary or commission due to the employee, or other money of the employee in the hands of the employer, must be deducted from the amount of the loss, and the employer is entitled to recover only the balance of loss up to the amount of insurance stated in the policy.

Where sureties or guarantees are held by the employer, the position of the insurers depends upon the terms of the policy. The latter may stipulate that the insurers are only to pay proportionately to other sureties in respect of the loss, in which case the insured can recover only a rateable part of the loss from the insurers; or it may state that the insurance will answer only if the other sureties fail, in which case the insurers can be called upon only for the deficiency resulting from the sureties which have made default. In the absence of any such stipulation, the insurers become liable for the loss, but can thereafter exercise their rights in equity or by way of subrogation against other sureties.

Solvency. In the case of solvency insurance, the purpose is to secure against non-payment of a debt, which might be a simple loan (e.g. discounting a bill of exchange) or a loan secured by mortgages or debentures. As soon as there is a default within the definition of the policy, the insured is entitled to recover from the insurers, leaving the

latter to exercise any remedies of the insured against the person defaulting, or to mitigate their loss by realizing the securities.

If the policy covers a specific debt, the object of the insurance is served and the policy ceases, but it may, however, continue after the first claim if the insurance covers a series of debts.

(3) CONTRIBUTION

The term "contribution" in insurance has purely a legal, not a popular, meaning. It does not in any way refer to the contributions made by the insured towards the cost of replacement of a lost or damaged article by reason of wear and tear or depreciation; such adjustments are made in pursuance of the principle of indemnity, which entitles the insured only to the amount of his loss.

Moreover, the factor of contribution affects only contracts of indemnity. It does not, therefore, concern personal accident insurances effected by the insured in respect of his own life, health, or limb. Sometimes it may be specified in a personal accident policy that the insured must declare other policies of a similar nature, effected either with the same or other insurers and obtain the insurers' sanction, failing which the insurance will not apply; or a condition may be found limiting the sum payable where more than one such insurance exists. Such conditions are only in the nature of limitations of the contract, i.e. "exceptions." Contribution might in certain circumstances affect personal accident insurances effected to benefit the insured in respect of the life, health, or limb of another person.

To understand "contribution," it is necessary to realize that when the insured sustains a loss he may be able to recoup it from more than one source, e.g. he may have insured his property with two different insurers under two exactly similar insurances. Under the principle of indemnity he cannot recover in full from each insurer, as he would thereby regain more than his loss. The questions naturally arise as to which insurer should pay and, if either pays, whether the other should be allowed to go scot-free. Comparison must be made with the contract of guarantee, whereby a person, the guarantor, undertakes to answer for the debt of another. The debtor may have also obtained a second guarantor for the full amount of the debt. On default of the debtor, and in the absence of any stipulation, the first guarantor can be called upon for the full amount of the debt, notwithstanding the existence of the second guarantor. By the law of equity, however, the second guarantor is not allowed to escape; after the debt is satisfied, he can be sued by the first guarantor for a proportionate part of the debt—in this instance, one-half. If the amounts guaranteed vary, then the amount of the debt must be satisfied by either or both guarantors, and there is an equitable right for adjustment between the guarantors in proportion to the amounts of their guarantees. This right is called the right of contribution, and applies equally to contracts of insurance as to contracts of suretyship or guarantee. Moreover, it is, as indicated, not a contractual right, but a right in equity. It is not a

matter of goodwill between insurers, and *exists without any stipulation in the contract of insurance.*

The right of contribution in insurance is, therefore, the right of one insurer, if he has satisfied the loss, to call upon co-insurers to share the loss; or if a call upon the different insurers has been made inequitably, the right between such insurers for an equitable adjustment. Generally in insurance contracts it has application only between insurers, though in fidelity and solvency insurance it may be possible to bring in co-sureties, but the terms of such contracts must be studied in order to ascertain their intentions, i.e. whether the insurance is intended as a co-existent safeguard or as a primary or secondary security against loss.

In order that the right of contribution may be applicable, however, it is necessary that the common insurances should be liable to satisfy the same loss in the same interest, and, therefore, certain principles have been established, viz.—

1. **Validity.** All the policies concerned must be in force at the time of the loss and must apply to the loss.

If one had lapsed before, or had commenced after the loss, or if the insurance had become void by reason of a condition precedent or subsequent of the policy, it cannot be called in.

Breach of a condition precedent of liability, however, e.g. notification of loss, would not necessarily affect the right between insurers.

2. **Same Peril.** The policies must cover the same peril. Any or all of the policies may cover other perils in addition, but the peril causing loss must be common to all.

A householder's comprehensive policy, which includes insurance on the building, therefore, could be called in with a policy covering fire risk alone on the dwelling.

3. **Same Subject-matter.** The policies must cover the same subject-matter. It is not necessary that each should cover the subject-matter alone—some or all of the policies may cover in addition other subject-matter, but the subject-matter of the loss must be common to all.

Thus a motor policy covering liability of the insured and accidental damage to the car (including fire) would be liable to contribute in a fire loss with a policy covering the fire risk alone.

4. **Same Interest.** The policies must cover the same interest. Different persons may have different interests in the same subject-matter and may, therefore, be entitled to insure; a warehouseman has an interest as bailee in the furniture he stores, the bailor has a different interest, viz., as owner. Similarly with pawnbroker and client, laundryman and customer, mortgagor and mortgagee.

Where there are differing interests amongst the policies concerned, there is no right of contribution. ("*North British & Mercantile*" v. "*London & Liverpool & Globe.*") If, however, one policy is expressed to cover the interests of both parties, and another policy one interest alone, e.g. where one policy covers mortgagor and mortgagee of the property, and the mortgagee effects a separate insurance, there is a common interest, and the right of contribuion arises.

For a common interest to arise it is not necessary that the different policies should be in the same name, but the person for whose benefit the insurances are intended must be the same, e.g. trustee and cestui que trust, guardian and ward.

5. **Sums Insured.** The sums insured may differ.

If they are insufficient *in toto* to satisfy the loss, then they would all be exhausted by the claims of the insured and contribution would not arise. If they are more than sufficient *in toto*, then the principle of contribution gives the different insurers a right to an equitable apportionment.

It is important to bear in mind, however, that this does not prevent the *insured* from calling upon one insurer alone, or partly on one and partly on another; but, after payment of loss, the insurer who had paid more than his share can take action in his own name against other insurers.

The apportionment, however, would not always be *pro rata*, and regard must be paid to the nature and circumstances of each contract. The situation may differ as between insurances on property, where values are readily ascertainable, and insurances on liability, where one policy may be limited and the other unlimited.

Assuming that there are two insurances applicable to the same loss, which together are more than sufficient to satisfy the loss, it may fairly be assumed that the position is as follows—

(*a*) Where, in the case of a total or partial loss of property, each insurance is sufficient or more than sufficient to cover a total loss of the property, each insurer pays one-half.

(*b*) Where, in the case of a total or partial loss of property, neither insurance by itself is sufficient to cover a total loss of the property, the apportionment is *pro rata* to the sums insured.

(*c*) Where, in the case of a total or partial loss of property, insurance A is insufficient to cover a total loss, and insurance B is sufficient or more than sufficient, the apportionment between A and B is *pro rata* as to the sum insured by A and the amount sufficient to cover a total loss.

(*d*) Where in the case of an insurance against liability, each insurance is sufficient to cover the loss, each insurer pays one-half; e.g. loss, £500; insurance A limited to £1,000; insurance B unlimited. (*Gale* v. "*Motor Union*"; and *Loyst* v. "*General Accident*.")

(*e*) Where, in the case of an insurance against liability, insurance A is insufficient to cover the loss and insurance B is sufficient or more than sufficient, the apportionment between A and B is *pro rata* as to the limit of indemnity insured by A and the amount of loss; e.g. loss, £1,000; insurance A limited to £500; insurance B unlimited. Apportionment is: A, one-third; B, two-thirds.

Complication may enter into the apportionment of loss of property by reason of the presence of the condition of average, which may appear in some or all of the policies, but it is not proposed to deal in detail with the subject of apportionment.

It is reasonable to adopt the principle, however, that consideration must first be paid to the position of each insurer had he stood

alone (*a*) in the case of property, to meet a total loss, and (*b*) in a case of liability, to meet the actual loss.

The above points do not altogether dispose of the situations which may arise. Sometimes the nature of the different insurances which are called into account may be so widely different—though answering to the above tests—as to raise a distinct doubt regarding the right of contribution. In particular, it should be noted that contracts are sometimes made expressly for the purpose of taking up any excess of loss beyond that which is more specifically insured, and do not, therefore, rank *pari passu* with specific insurances.

It will have been observed that the right of contribution is a right between co-insurers and does not affect the right of the insured, so long as he does not obtain more than an indemnity, to call upon any or all of the insurers to satisfy his loss. Insurers frequently insert a condition in their policy, however, limiting the right of the insured, so that he can only directly recover a due proportion of the loss, thus forcing him to seek the balance from other insurers involved. (*Gale* v. "*Motor Union,*" and *Loyst* v. "*General Accident.*")

This condition is called the contribution clause, and is generally made a condition precedent of liability. The insured's right to an indemnity is not affected, but in addition to the right in equity to force other insurers to contribute, each insurer has a right by contract to force the insured to claim only a proper proportion.

In practice, the different insurers will frequently agree, notwithstanding this clause, that one insurer shall meet the insured to the full extent of the loss, and thereafter adjust it between each other.

(4) SUBROGATION

It has been said that a contract of insurance (except personal accident) is a contract of indemnity. The following two doctrines operate to prevent the insured from recovering anything beyond the loss which he has sustained, viz., indemnification aliunde and subrogation.

In the case of a loss, whether it be in the nature of loss of or damage to property, or a pecuniary liability, the insured may be in the position of being able to recover his loss, or part of it, from another source. He is not bound to claim upon the insurers, but if he does claim upon them for a full indemnity, the insurers are entitled to the benefit of any factor which will diminish or extinguish the loss. (*Castellain* v. *Preston.*)

Neither doctrine depends for its operation upon the existence of a condition in the policy, but is a right in law.

Indemnification Aliunde

The receipt by the insured of any payment or benefit from another source in diminution of the loss for which the insurers provide indemnity is known as indemnification aliunde (indemnity elsewhere). The insured must account to the insurers for any such payment or benefit, whether it is received by the insured before or after settlement of his claim; if received before settlement, he must deduct it from his claim;

if received after settlement, he must render it to the insurers. (*Castellain* v. *Preston; Meacock* v. *Bryant.*)

It is immaterial whether the payment or benefit is received by virtue of a right in tort or contract against a third person, or by way of gift or act of grace. (*Castellain* v. *Preston.*) In the latter case, however, it must be clear that the gift relates to the subject-matter of insurance—if it is intended to benefit the insured alone, e.g. if it is in respect of his uninsured loss, it cannot be taken into account.

The doctrine of indemnification aliunde has the following effects—

1. **Salvage.** In the case of a total loss of property, viz., where the property has ceased to exist in specie or cannot be economically reinstated, there may yet be some pecuniary value in the salvage, e.g. cargo damaged by sea-water or the remains of a motor-car destroyed by fire.

If the insured elects to keep the salvage he must deduct its value from the loss.

2. **Money.** Where an employer sustains a loss through the defalcations of an employee whose risk is insured by the employer under a fidelity policy, the employer would have to deduct from his claim any money in his hands belonging to the employee and any salary or commission which, but for the loss, would have been payable to the employee. He may also have to account for securities or guarantees held by him in respect of the employee.

Similar items may arise under solvency policies.

3. **Property.** Where the loss is occasioned by the wrongful act of a third person, so as to give the insured a right in tort, or where a third person is responsible for the safe custody of the property, any sums received from the third person in respect of the loss must be used to diminish the claim. As regards the prosecution of such rights in tort or contract, see Subrogation below.

4. **Liability.** The responsibility incurred by the insured may be the subject of indemnity under a contract between the insured and a third person, the insurance being a contingent precaution. The same position arises as with contractual rights in relation to property.

Thus a public authority employing an independent contractor to carry out certain work may have stipulated that the contractor shall be responsible for all claims arising by negligence in its execution or by reason of its dangerous nature. The insurers who undertake the liability of the public authority would be entitled to benefit by any diminution of loss by reason of recovery effected under the contractual indemnity.

5. **Partial Indemnity.** The principle underlying indemnification aliunde is only to prevent the insured recovering more than an indemnity.

If, therefore, a person is under-insured he is obviously entitled to payment or benefit from other sources to supplement the amount recoverable from the insurers to the extent that he does not thereby obtain more than an indemnity.

In certain circumstances, however, the insurers may be entitled to share in such proceeds, e.g. where an insurance in respect of property

against burglary is subject to average; or where special stipulations are made under policies of fidelity or solvency insurance.

SUBROGATION

Subrogation is the right of the insurers to be placed in the position of the insured in relation to the subject-matter of insurance. The right does not arise until *after settlement of the claim.* Indemnification aliunde relates to any advantage derived by the insured from another source either voluntarily or with the consent of the insurers. (*Castellain* v. *Preston.*)

The distinction is important in that it is a principle of subrogation that the insured must not either before or after settlement of claim do anything, e.g. compromise or take proceedings, which will prejudice the insurers' right to subrogation.

The effects of subrogation are as follows—

1. **Salvage.** After paying a full indemnity for the total loss or destruction of property, the insurers take the position of the insured in relation to the property so far as rights of ownership or possession are concerned.

If, therefore, the insured claimed as owner for the loss, the insurers automatically become owners of the salvage and can retain, use, or dispose of it in their own name. Similarly the insurers become owners of any stolen property for which they have paid and which is subsequently recovered.

2. **Money.** By reason of the defalcations of an employee whose risk is insured by the employer under a fidelity policy, or of the failure of a debtor under a solvency policy, certain rights may arise in tort or contract. Having indemnified the insured, the insurers are entitled, in the name of the insured, to pursue these rights in diminution of their loss.

The act of the employee may be both a tort and a crime, and in addition to being prosecuted for the crime, the employee may be sued in tort at the instance of the insurers to reimburse the money stolen or embezzled; and any recovery thereby effected is payable to the insurers.

Rights in contract may be enforced by the insurers against guarantors of an employee's fidelity or of a debtor's solvency, or against the debtor himself.

3. **Property.** As already indicated, the cause or the circumstances of loss of, or damage to, property may give rise to certain rights of the insured against third persons, either in tort or in contract in relation to the property.

The insurers after indemnifying the insured become entitled to these rights and can pursue them in the name of the insured. (*Castellain* v. *Preston; "North British & Mercantile"* v. *"London & Liverpool & Globe."*)

Thus a motor vehicle covered by the insurers may be damaged by the negligent act of a third person. The insurers after payment can claim against the third person for the amount of damage, and can take action in the court for recovery, or compromise the claim

and give the third person a valid discharge in respect of the damage which formed the subject of the insured's claim.

Carriers of goods are under an implied contract for the safe custody of the goods, or there may be an express contract in relation thereto. The rights of the insured against the carrier for the loss of the goods may be pursued by and for the benefit of the insurers, and proceedings taken or a compromise effected as they may deem fit.

4. **Liability.** Liabilities in tort to one person cannot be evaded by contract with another person.

Thus a public authority or other concern, which engages an independent contractor to do work of a dangerous nature, can be held directly responsible for injury caused to third persons by the negligence of the contractor's workmen in the execution of the work, and cannot evade this responsibility by a clause in the contract that the contractor shall be responsible for any compensation or costs so incurred.

The authority may insure against this liability; the insurers if called upon to pay by reason of the injured person making his claim against the authority, can subsequently pursue against the contractor, by right of subrogation, the right of the public authority for reimbursement under the clause of the contract.

5. **Partial Indemnity.** In relation to salvage, subrogation does not arise unless and until the insured has obtained full indemnity for a total loss; except that the presence of a condition of average or special stipulations may alter the position.

With regard to rights in contract or tort, the insurers would generally stand in the position of the insured to the extent of the loss which they have paid, and would, therefore, have a joint interest with the insured in pursuing any remedies against third persons.

There are certain further points which should be noted in relation to both indemnification aliunde and subrogation, viz.—

The contract of the insured with the insurers is that the insurers shall pay the loss if it occurs by reason of the peril insured against. In the absence of any stipulation, therefore, the existence of rights of indemnity elsewhere is not a bar to his right to claim upon the insurers for the indemnity provided by the insurance. The insurers cannot compel him to seek first his remedies against third persons for the purpose of alleviating their loss; nor can they take these remedies into account for the purposes of determining their liability towards the insured. If after payment of claim they compel him to seek recourse against third persons for their benefit, he is entitled to deduct his reasonable expenses of doing so from any amount recovered.

The rights of the insurers in relation to the subject-matter of insurance are not limited to the direct responsibilities of third persons. Every factor must be taken into account which, by virtue of the position of the insured, may act to diminish or extinguish the loss sustained. Thus in the sale of goods if the risk has passed at law to the purchaser, so that he is bound to complete his contract by payment

of the full purchase money, notwithstanding destruction of the goods before delivery, the insurers of the vendor's interest are entitled to the benefit of the right thereby vested in the vendor to enforce payment from the purchaser.

The insurers can pursue in the name of the insured only the remedies of the insured against third persons. Any weakness in the insured's claim, therefore, is a weakness to the insurers. Thus if the insured has released or compromised with the third person, such a factor bars any action against the latter by the insurers. The insured, however, becomes responsible to the insurers for the loss occasioned to them by any such action on his part.

In the case of a partial indemnity, the insured retains the right to take proceedings for recourse against third persons, but he must sue for the full amount of the loss. Where he is under-insured for a certain item of loss, he must render to the insurers any amount recovered in excess of his uninsured loss. Where he sues for two or more items of loss, one of which is fully insured and the others uninsured, he must account to them, if it can be apportioned, for the full amount recovered in respect of the insured loss. In such a case, if he compromises without their consent, it will be deemed that he has recovered in full for the insured loss. The costs of the litigation would, unless otherwise agreed, be apportioned according to the amounts of the interests of insured and insurers. If by agreement the insurers conduct the litigation, they on their part must sue for the full loss sustained by the insured and account to the insured for the excess; if they release the third person by compromise so far as the insured loss is concerned, they must not thereby prejudice the rights of the insured in respect of his uninsured loss.

(5) PROCEEDINGS

The following matters in dispute in connection with a claim upon the insurers may give rise to legal proceedings, viz.—

(1) The existence of the contract of insurance; (2) the validity of the policy; (3) the liability of the insurers for the loss; (4) the amount of their liability; and may have to be determined either by—

(*a*) Action in the court; (*b*) Arbitration.

As will be seen hereafter, the insurers may be able to compel arbitration in respect of the validity of the policy or of matters governed by the policy, viz. (2), (3) and (4), but not if they challenge the existence of the contract of insurance.

Action

The course of the proceedings governing an action in the court is similar to that attending proceedings under other written contracts. Proceedings are generally brought in the High Court and are governed by the Rules of the Supreme Court. If the claim does not exceed £200, proceedings may be taken in the County Court, but the defendant has the right to have the action transferred to the High Court if the claim is above £100. Proceedings in the County Court are governed by the County Courts Act, 1934, as amended by the Administration

of Justice (Miscellaneous Provisions) Act, 1938. For sums under £100, proceedings can be taken in the High Court, but unless an important point of law arises, there is a risk as to the award of costs.

An action in the High Court usually proceeds as follows—

Writ of Summons. The action is commenced by Writ of Summons of the court, upon which is stated the parties to the action and the cause of the action. Copy of the writ must be served by the plaintiff or his solicitors either upon the defendant personally (or in the case of a limited company by registered post) or upon solicitors authorized by the defendant to accept service. Substituted service, e.g. by advertisement or registered post, can be made only by leave of the court.

Time. The action may be commenced at any time within six years after the cause of action has arisen (Limitation Act, 1939); if the insurance is under seal—twelve years. The cause of action is not complete until payment has become due under the policy.

Parties. The plaintiff may be the insured, or his personal representatives, trustee in bankruptcy, liquidator, or assignee. The defendant would be the insurance company or, if the policy has been issued at Lloyd's, one of the individual underwriters. Underwriters at Lloyd's can only be sued individually, each for his several liability. In practice the action is taken against the first underwriter, and the others generally undertake to abide by the result.

Damages. The claim is usually for "unliquidated" damages, i.e. damages to be assessed by the court, unless the amount of the claim be certain, e.g. total loss under an agreed value policy; payment under personal accident policy.

Appearance. The defendant (or his solicitors) must enter an Appearance to the writ within eight days of service. Otherwise judgment may be entered by default, which judgment may be (1) final, if the writ is indorsed with a "liquidated" amount; and (2) interlocutory, if the writ demands "unliquidated" damages. In the latter case the damages are assessed by a Master of the Supreme Court or, in the Provinces, by a District Registrar.

Statement of Claim. This is a statement by the plaintiff of the substance of his claim and the nature and extent of the contract. He must specifically state the policy and its nature, the subject-matter of insurance, his insurable interest thereunder, and particulars and cause of the loss. A copy of the Statement of Claim is served on the defendant. The Statement of Claim may be indorsed on or delivered with the Writ of Summons, but if not it must be delivered to the defendant within ten days of Appearance.

Defence. This is a document prepared by the defendant setting forth particulars of the reasons for refusing the claim. The reasons, e.g. breach of condition, fraud, exception in the policy, must be fully detailed. A copy of the Defence is served on the plaintiff. The Defence must be delivered fourteen days after receipt of Statement of Claim, or, if the claim is indorsed on or delivered with the Writ, fourteen days after entry of Appearance.

Reply. A reply has to be put in by the plaintiff where the Defence contains a counterclaim by the defendant. Occasionally in other cases a reply may be desirable, e.g. if the insurers plead breach of condition.

Order for Directions. After the close of the Pleadings, i.e. Statement of Claim, Defence, Reply, a Summons for Directions is taken out by the plaintiff's solicitors. This summons is heard before a Master in Chambers or a District Registrar of the High Court, and an order is made for the further conduct of the action, i.e. discovery of documents, interrogatories, place and mode of trial.

Place of Trial. This is usually the High Court, or if the parties reside in the Provinces, an Assize Town which the Master considers convenient for the parties. In the County Court, the proceedings must be commenced either in the Court for the district in which the defendant resides or carries on business, or in the Court for the district in which the cause of action wholly or in part arose.

Mode of Trial. Normally the trial is by a judge alone, unless fraud is alleged, in which case a jury will be allowed. The jury is the judge of fact; questions of law are matters for the judge.

Trial. The evidence given by the plaintiff relates to proof of the policy and of the loss sustained. If the plaintiff establishes a prima facie case, then the onus shifts to the insurers, who must prove the grounds upon which they rely, e.g. the application of an exception, breach of a condition, fraud, etc.

ARBITRATION

Arbitration is an accepted form of legal procedure for settling a dispute under a contract otherwise than by an action in a court of law. It can be adopted where both parties expressly agree to a reference or submission of the matter in dispute to one or more arbitrators. Such an agreement may be made for either immediate or future disputes. (*Scott* v. *Avery.*)

In matters of dispute under a policy of insurance, it is usually unnecessary for the parties to agree to a submission to arbitration on each occasion, as the policy generally contains an arbitration clause stipulating that differences shall be settled by this method. Such a clause in the policy is in itself a valid submission for each and every difference which arises within its scope; and, unless the clause so provides, the submission to arbitration cannot be revoked.

The Arbitration Acts, 1889 to 1934, codify the law in England as to arbitration. They provide that a submission may not be revoked, and that unless otherwise agreed, reference shall be to a single arbitrator. If the parties cannot agree upon an arbitrator, or if two arbitrators do not appoint an umpire, the court will make the appointment upon the application of either party.

The procedure in an arbitration is governed by the Arbitration Acts, and the result is as effective as that of trial in a court of law. The parties and their witnesses can be compelled to attend, to produce all relevant documents, and to give evidence on oath. The award of the arbitrator or umpire is final, and the costs are in his discretion. Arbi-

tration does not oust the jurisdiction of the court, but is a conclusive legal procedure of which the result cannot be set aside, except where the arbitrator or umpire is guilty of misconduct. There is, therefore, no appeal to the court on a question of fact, but only on a question of law. If the arbitrator in special instances does not deem it advisable to arrive at a conclusive decision, he may, in the form of a special case, state an award for the opinion of the court or refer to the court a question of law arising in the proceedings. The award of the arbitrator may, by leave of the court, be enforced in the same way as a judgment or order of the court.

Arbitration in Scotland is regulated by the Arbitration (Scotland) Act, 1894, and in Ireland by the Common Law Procedure Act (Ireland), 1856.

The arbitration clauses which are contained in policies of insurance vary in their terms of reference and in their scope of application. In some, it is provided that reference to arbitration shall be in accordance with the provisions of the statute; in others, that two arbitrators shall be appointed, one by each party to the dispute; and the arbitrators in turn shall appoint an umpire before entering on the reference. The scope of the arbitration clause usually governs all disputes under the policy, and the arbitrators accordingly have power to determine not only questions of liability and amount, but also questions of law, of construction, and even of fraud. (*Scott* v. *Avery; Woodall* v. "*Pearl.*") In odd instances, the arbitration clause may be limited to questions of amount or to questions of liability and amount. (*Jureidini* v. "*National British and Irish Millers.*")

It is important to stipulate in the arbitration clause of the policy that arbitration shall be a condition precedent to the liability of the insurers and to any right of action against the insurers in respect of matters falling within the scope of the clause. In a matter of dispute coming within the clause, the insured then has no cause of action against the insurers for the loss itself, but only for the enforcement of the arbitrator's award. If, therefore, the award is against the insured, he cannot sue on the policy. (*Elliott* v. "*Royal Exchange*"; *Golding* v. "*London & Edinburgh.*")

If the arbitration clause is not made a condition precedent of liability, it is then only a collateral clause of the contract providing a method of settling disputes, and it does not prevent the insured from commencing an action on the policy, his cause of action being the right to recover his loss from the insurers. (*Elliott* v. "*Royal Exchange.*") The insurers may in such case apply to the court, under the Arbitration Act, 1889, for the action to be stayed and for the matter in dispute to be referred to arbitration as provided by the clause. The court have a discretion in granting or refusing a stay, which discretion must be judicially exercised (*Heyman and another* v. *Darwins, Ltd.*), but the court will generally refuse if fraud is alleged.

As indicated above, an arbitration clause does not nullify an insured's right to sue on the policy, but in its more common form limits his cause of action to the enforcement of the arbitrator's award. It does

not, therefore, set aside the jurisdiction of the court in a matter of contract; to do this, it would be necessary to stipulate that disputes should be conclusively settled by arbitration, and in the clause prohibit any reference under any circumstances to the court. Such a stipulation would be wholly invalid, and is consequently never encountered. (*Elliott* v. "*Royal Exchange*.")

It is necessary clearly to distinguish (*a*) a dispute under the policy from (*b*) a dispute that a contract of insurance was made (*Woodall* v. "*Pearl*"). The arbitration clause is a term of the policy, and can, therefore, govern matters only where it is admitted that a contract was made, but its application to a particular matter is denied. If the making of the contract is in dispute, then obviously a term of the policy, such as the arbitration clause, cannot govern the settlement of the dispute. If the insurers, therefore, refute liability for a loss on the grounds that no concluded contract of insurance was made between the parties, the arbitration clause is no bar to an action in the court for the recovery of the loss; the cause of action in such case is not the indemnity of the policy, but damages for breach of contract. Similarly the clause does not affect an action for matters outside the terms of the contract, such as rectification of the policy, or, if the policy is declared void, for return of the premium; or, if the premium be unpaid by the insured, for enforcement of payment.

Moreover, the arbitration clause can be enforced only in relation to matters within its scope. If the clause governs disputes only as to the amount of loss, it forms no bar to an action if the insurers dispute their liability by reason of the breach of a condition precedent of the policy (e.g. good faith). (*Jureidini* v. "*National British & Irish Millers*.")

(6) SETTLEMENT

A contract of insurance is ordinarily a contract to pay a sum of money to the insured or his representatives or assignees, and the insurers cannot settle their liability in any other form unless the policy expressly provides for, or the person entitled agrees to accept, an alternative method of settlement. The provision of an alternative method in the policy does not arise in insurances against personal accidents, fidelity, or solvency, but has a distinct bearing on insurances against loss of or damage to property or against a liability.

LIABILITY

In insurances against a liability, the insurers reserve the right to take over and conduct the settlement of the claim made by a third person upon the insured, and prohibit the insured from making any payment, admission, or promise on his own part. The insurers, therefore, have the option of (*a*) paying to the insured the amount of the liability incurred, including costs (if insured); (*b*) paying to the insured the full amount of their indemnity; or, (*c*) negotiating with and making a payment to the third party in discharge of the liability.

PROPERTY

In the absence of a reinstatement clause in the policy, the insurers cannot without the insured's consent settle their liability by insisting on repairing or replacing the damaged property. The insurance is a contract to pay a sum of money, unless it contains an option exerciseable by the insurers to reinstate. The option is available only to the insurers and, if they do not elect to exercise it, the insured cannot ordinarily compel them to reinstate.

REINSTATEMENT

The exercise of the reinstatement clause by the insurer puts them under certain obligations to the insured, viz.—

(*a*) Having elected to reinstate, they are bound to that method of settlement, even if they eventually find it will cost more than the sum insured, or that it has become impossible to reinstate. Their failure, then, to reinstate becomes a breach of contract, for which the damages recoverable by the insured are not necessarily measured by the sum which the insurers would have had to pay had they settled in cash.

(*b*) The reinstatement must be reasonable and proper. If the goods are lost, the insurers must replace with other goods of a similar nature and quality; if the property is damaged, it must be repaired and restored to its condition prior to loss.

(*c*) Election to reinstate must be made within a reasonable time, or, if the clause specifies a time limit, within such time, otherwise the right to reinstate will be lost. The right may also be forfeited by the conduct of the insurers, e.g. by negotiating with the insured upon the basis of a settlement in cash. The mere fact, however, that the insurers inquire into the value of the property to ascertain the extent of the loss is not, by itself, conduct sufficient to show the insurers' election to pay in cash.

In the case of a reinstatement, the insured is under a duty to give the insurers all reasonable assistance and information to enable them to reinstate. His refusal to do so, and thus render reinstatement impossible, would discharge the insurers from liability for the loss.

CASH

The settlement of a loss by the payment of a sum of money contemplates payment in cash, and the payee is not bound to accept any other form of payment.

Payment, however, is frequently made by negotiable instrument, e.g. cheque or bill of exchange, and if the payee accepts the instrument in full discharge, the original claim is closed. If, then, the cheque or bill is subsequently dishonoured, he can only sue the insurers upon the instrument. If he has not, however, accepted the instrument in settlement, it is optional for him to sue upon the instrument or upon the original consideration.

PAYEE

When the insurers elect, or are under an obligation, to pay the

claim in cash to the person entitled thereto, the person to whom payment is due is not necessarily the insured. If the proceeds have been assigned, payment may have to be made to the assignee; in the case of the death of the insured, to his personal representatives; in the case of bankruptcy to the trustee. Where the insured is in debt to another person under a judgment, the judgment creditor may claim the policy moneys by garnishee proceedings, provided he takes steps after the amount due has been ascertained. If the insured's claim is invalid by breach of condition, none of the persons who claim through the insured has any greater claim than the insured himself, unless otherwise provided in the policy, or unless the insurers are denied by estoppel from taking objection.

Interpleader

Where there are two or more different persons claiming to be entitled to the policy moneys, the insurers may protect themselves by interpleader proceedings, provided they are disinterested in the rival claims. This does not, however, apply to a case where one claimant seeks to enforce a statutory right to reinstatement, whilst another seeks payment in money. The insurers, in interpleader proceedings, may be directed to pay the money into court, to await the result of the decision of the court; in such event they are released from their liability against all claimants.

Interest

If proceedings taken to enforce a claim have been successful, the court may at their discretion allow interest for the whole or any part of the period from the time of the loss (Law Reform, Miscellaneous Provisions Act, 1934); such an award being on the basis of damages for the wrongful detention of money due, and not a matter of contract.

Mistake

With certain exceptions, insurers who discover that they were mistaken as to their liability can recover the money paid, if the mistake is one of fact. The insurers cannot recover if the money is paid by a mistake of law or under process of law (*Sawyer* v. *Window Brace, Ltd.*). In the case of a mistake of fact, the insurers cannot recover where they have paid intentionally and deliberately without regard to the truth or falsehood of the facts.

In order to grasp more readily the application of Principles to Practice, readers are strongly advised, when reading the text, to refer forthwith to the Alphabetical Appendixes when cases and statutes are quoted.

CHAPTER VI

AGENCY

GENERAL principles—The principal—The agent—Imputed knowledge—Payments

For Cases and Statutes cited herein, see Appendixes

(1) GENERAL PRINCIPLES

THE previous chapters have dealt with the contractual relations which arise between the principals, i.e. the insured and the insurers, in the various stages of a contract of insurance.

AGENT

A principal may employ another person to assist him and/or act on his behalf in respect of the various matters which arise in connection with the contract of insurance, from the preliminary negotiations onwards. Such a person, acting on behalf of a principal, is termed an *agent*. Unless the contractual act, by its nature or by stipulation in the contract, is one which must be done in person by the principal, it may equally well be done by his agent. With certain qualifications, the act of the agent is then to be deemed the act of the principal—*qui facit per alium facit per se*.

A person who cannot make a valid contract personally cannot make that contract through an agent. *Per contra*, however, a person under contractual disability is not precluded from acting as an agent. Thus, a minor acting as agent for a principal of full age, can make a binding contract between parties.

The word "agent" has a colloquial meaning in insurance parlance. The term is commonly used to denote the person who introduces the business to the insurers. In law it has a much wider meaning, and embraces all persons who act at any time as intermediaries between insured and insurers, whether in making and renewing the contract, payment of the premium, or enforcement and settlement of claim.

AGENT OF THE INSURERS

The insurers generally act by means of their agents in all matters relating to the transaction of insurance. A limited company can act only by means of its agents; the directors, management, and staff are all agents of the company for various purposes. Underwriters at Lloyd's—whilst maintaining the separate liability of each individual underwriter—group together for the convenience of their business, and appoint a member of the group or other person to act as agent for the purpose of accepting insurances on behalf of members of the group. (*Hambro* v. *Burnand*.)

Besides the persons who act as agents for the insurers in making the contract, there are other agents who introduce the business, collect the premiums, conduct the negotiations between insured and insurers, and settle claims made against the insurers.

Agent of the Insured

The insured will frequently act personally in making the contract of insurance and in other matters connected therewith. Sometimes he will employ his secretary, a clerk in his office, his solicitor, or other person to act on his behalf, i.e. as his agent. Such a person may be purely the agent of the insured. In the majority of cases the insured or proposed insured will call in the services of an "insurance agent" or "broker" to act for him in seeking quotations and making the contract. An "insurance agent" or "broker" may have a dual capacity in the same contract, being the agent of the insured for some purposes, e.g. making the contract, and the agent of the insurers for other purposes, e.g., collecting the premium.

Thus there may at times be a series of agents between the parties—

Insured.
Insured's secretary—acting as agent of the insured.
Broker—acting as agent of both parties.
Insurers' underwriter—acting as agent of the insurers.
Insurers—a limited company or Lloyd's underwriters.

It does not follow—as will be seen hereafter—that each of these intermediaries or agents adheres closely to his own particular functions in the transaction.

Authority

The fact that a person does or seeks to do something professedly on behalf of another person, and not on his own responsibility, presupposes that he acts as agent upon a general or specific request by the other person, i.e. with authority given to him by or on behalf of a principal. Two questions may arise from such an act, viz. (1) whether this authority actually exists and (2) whether the act has been performed rightfully, wrongfully, or negligently by the agent. Upon these questions depend the relations of the parties (principals) involved in the transaction, and the rights, duties, and liabilities of such parties and their agents.

Express Authority

The authority of an agent may be either express or apparent. The agent has express authority where he acts upon the direct instructions of his principal, either for the purposes of a particular act or in respect of a series of transactions, or generally in connection with all matters of a particular class. (*Hambro* v. *Burnand.*) Thus an intending insured may instruct an agent to effect an insurance; a collector may have authority to collect insurance premiums for a specified district; an

employee may be empowered to accept insurances, receive premiums, pay claims, and carry out other acts incidental to his employment.

Apparent Authority

In some cases where a person acts on behalf of another, it may be that no express authority exists or can be established; yet the conduct of the principal may be such as to raise the inference that a person doing a particular act does it with the authority of the principal. (*Murfitt* v. "*Royal.*"). In such cases the agent is said to act with "apparent" authority, i.e. authority which, owing to the conduct of the principal, appears to the mind of a third person as expressly granted by the principal.

The conduct of the principal may be directly consistent with agency, e.g. where a person claims under a policy effected on his behalf by another person; or, without any such act of recognition, the conduct of the principal may have been such as to mislead a third person as to the existence of agency, e.g. where an agent, furnished with printed cover notes of the insurers, grants cover by means of such cover notes after his agency has been terminated.

Unauthorized Acts

When a person purports to contract with a third person without either the express or apparent authority of a principal, no contractual relations would ordinarily arise between the principal and the third person. The principal may, however, adopt the contract by what is termed ratification, in which case the effect between the parties is such as if prior authority had existed. This is possible, even though the person professing to act as agent is an absolute stranger to the principal.

General Effect

A contract made between parties by means of an agent or agents is as effective as if it were made directly by the parties concerned, provided that the acts of agency have been done with the express or apparent authority of the principals, or that any act which has been done without authority has been duly ratified.

Any act in relation to the contract, if performed by an agent, is similarly effective. (*In re "Universal," Forbes & Co's claim.*) The party, moreover, who is bound by means of the act of his agent, is equally bound by the manner of its performance: thus the act is none the less effective as between principals, though the agent has acted wrongfully or negligently. (*Hambro* v. *Burnand; Lloyd* v. *Grace Smith & Co.*) Hence, if a proposed insured makes a full disclosure to the agent appointed by the insurers to conduct negotiations, a policy issued by the insurers is binding, although, for instance, their agent had omitted to inform them of the fact revealed to him by the proposed insured that another office had refused the risk.

(2) THE PRINCIPAL

Rights

The principal is entitled to the benefit of any act done on his behalf by an agent who acts on the express or apparent authority of the principal, provided he would be entitled to benefit if the act were done by himself.

If at the request of the proposed insured his agent transmits to the insurers a completed proposal which is accepted by the insurers, the insured is entitled to claim under the insurance. If the insured's employee, whose duty it is to arrange insurance, effects a policy on the employer's goods with Company A, though instructed to insure with Company B, the insurance with Company A is none the less enforceable by the insured. If the insurers' agent, who is authorized to accept insurances, makes a contract of insurance, the insurers are entitled to sue for the premium, even though their agent had exceeded his authority by accepting an insurance of a class which he had been instructed to refuse.

A void insurance effected by an agent, however, would be equally void as if made directly between insured and insurers, e.g. an insurance on goods without interest as owner, bailee, or otherwise.

The principal is also entitled to take the benefit of any act done on his behalf without authority, provided he actually ratifies the act.

Liabilities

The principal is bound by the act of an agent done on his behalf with his express or apparent authority, provided he would have been bound if the act had been done personally.

Acts of Express Authority

The agent has express authority where he acts upon the direct instructions of his principal. Thus, if an agent is instructed by the proposed insured to effect certain insurance, and does so, the insured becomes liable to pay the premium. If the insurers' employee has instructions to accept certain classes of insurance, the insurers become liable under the acceptances on risks of those classes.

Acts of Apparent Authority

The apparent authority of an agent for certain purposes generally arises out of his express authority, or because the agent has, or has had, express authority for other purposes such as (*inter alia*)—

(*a*) Matters directly concerning the execution of the express authority,

E.g. the insurers' agent authorized to negotiate the insurance has authority to explain to the proposed insured the questions in the proposal, and to determine the limits of disclosure (*Bawden* v. "*London Edinburgh*"; *Thornton-Smith* v. "*Motor Union*"): the insured's agent has authority to disclose all material facts to the insurers, and the proposed insured is, therefore, responsible for his omissions.

(*b*) Matters of ordinary business arising out of the express authority, e.g. the insurers' agent authorized to negotiate the insurance has authority to receive notification of loss or other notices required by the conditions of the policy (*Marsden* v. "*City & County*"), unless the conditions expressly require notice directly to the insurers; the insured's agent employed to effect the insurance has authority to pay the premium.

(*c*) Conduct of the principal which leads to the inference of authority.

This generally affects cases where the agent exceeds his authority, or acts *qua* agent after his authority has been withdrawn.

Thus the insurers' agent authorized to conduct negotiations, who has from time to time given temporary cover to a proposed insured, which the insurers have subsequently confirmed, can bind them, even by verbal protection, if the insurers' acquiescence in prior instances has led the proposed insured to infer the existence of authority. (*Murfitt* v. "*Royal*.")

The insurers' agent who has been entrusted with blank renewal receipts can, by issuing such a receipt, commit the insurers to the renewal of an insurance, even though his agency has been determined before such renewal.

Again, if an agent has at times endorsed alterations on policies with the acquiescence of the insurers, the insurers cannot repudiate an alteration to which, had they prior knowledge, they might not have assented.

Any such unauthorized act can be repudiated only if the principal takes prompt steps before the position of the third person has been prejudiced; thus, if a loss has meantime occurred, the insurers are too late to correct their position. (*In re* "*Economic*.")

Limitation of Authority

An express limitation of authority, if unknown to a third person, will not preclude the operation of the principle of apparent authority. Thus, if an agent is authorized to collect premiums, but expressly instructed not to give credit, the giving of credit may nevertheless be within the scope of his apparent authority.

The knowledge which a third person should have, however, as to the agent's authority depends on the nature of the agent's employment, and any act which falls outside the known authority fails to bind the principal; thus, a solicitor employed by the insurers in litigation has no authority to receive on their behalf disclosure of facts for the purposes of a subsequent insurance.

Wrongful or Negligent Acts

A wrongful or negligent act on the part of the agent binds the principal if the act was otherwise within the scope of the agent's express or apparent authority; thus, if an agent has authority of the insurers to accept certain non-hazardous insurances, and by inadvertence accepts a hazardous risk, the insurers are nevertheless bound to the contract; again, if an agent with real or apparent

authority acts fraudulently, e.g. accepts insurances with a view to receiving the premiums and retaining them for his own benefit, the insurers cannot repudiate the policies. (*Hambro* v. *Burnand; Lloyd* v. *Grace Smith & Co.*) The fraudulent act of an agent acting within the scope of his apparent authority may also render a principal liable to an interested third party who is injuriously affected thereby. (*Uxbridge Permanent Benefit Building Society* v. *Pickard.*)

TERMINATION OF AUTHORITY

The principal may withdraw the authority of an agent at any time, but the effects of his apparent authority may thereafter continue in matters affecting third persons who have already had dealings with him whilst he was acting as agent for the principal, unless such persons are notified of the termination of the agency. (*Marsden* v. "*City & County.*") This applies, however, only where the agent has been employed to carry out transactions of a class; not where he has only been employed for a particular transaction. Thus, authority of the insured's agent ordinarily ceases when he has arranged the particular insurance he has been authorized to effect, and his authority, both express and apparent, to act on behalf of the insured ceases until he is freshly authorized. The insurers' agent, however, is generally authorized to carry out a continuous class of transactions, and notice of termination is, therefore, necessary to persons who have dealt with him.

RATIFICATION

The right of ratification arises where a person has acted on behalf of another without authority either real or apparent, viz., where an agent of the principal for some purposes has acted in excess of his authority, or where a person in no way clothed with authority has purported to act on behalf of a principal.

Upon ratification, the act is deemed to be that of a duly authorized agent acting on the prior instructions of his principal, and the principal, therefore, becomes entitled to benefit therefrom, and equally, becomes responsible for liabilities attaching thereto. Thus, if an agent without authority effects an insurance, and the insured thereafter ratifies his act, the insured is entitled to enforce the insurance and the insurers can seek from him the premium.

There are certain essential qualifications which must attend the act of the agent in order that it may be capable of ratification, viz.—

1. The unauthorized person must have purported to act as an agent.

If a person insures in his own name, without indication of other interest, it cannot afterwards be alleged that the insurance was intended to benefit another person so as to permit the latter to ratify.

2. The agent must have intended to act on behalf of a principal.

If, whilst using the name of the principal, he intended to benefit himself, the principal cannot ratify.

3. The principal seeking to ratify need not have been named by the agent, but it must be established that he is the person, or one

of a class of persons, whom the agent had in contemplation as a principal.

4. The act must be one of which the principal is legally capable.

An act which is *ultra vires* of a company cannot be ratified by the company. Thus, if policies of insurance not within the powers of the company as contained in its Memorandum of Association have been issued by the directors, the company cannot ratify the insurances; the company cannot therefore enforce payment of the premiums on the insurances, nor, on the other hand, can it be liable thereunder.

5. The principal must have an existence at the time the agent purported to act.

Thus, a company cannot ratify insurances effected in the name of the company before its incorporation.

6. The principal must at the time of the alleged ratification have knowledge of the circumstances, or have waived further inquiry as to the act of the agent.

The fact that instructions were being sent by the insured for a certain insurance is not, therefore, ratification of an insurance of the same risk already effected by the agent without the knowledge or authority of the insured, so as to entitle the insured to claim for a loss prior to the receipt of his direct instructions. (*Grover & Grover* v. *Mathews.*)

7. The ratification or repudiation when once made is definite.

If the principal by his act or conduct has signified his intention not to be bound by the act of his agent, he cannot afterwards seek to ratify the act for the purpose of obtaining benefit therefrom. Thus, if he refuses to pay the premium on an insurance effected on his behalf, on the grounds that the insurance was unauthorized, he cannot seek to claim for a loss which subsequently occurs.

Time of Ratification

The general principle which governs the time of ratification is that the principal should at the time be capable of making the same contract as that which he seeks to ratify. A person cannot validly insure against a loss which he knows he has already sustained, and, therefore, it would seem to follow that he cannot after loss ratify an insurance already effected without his authority in respect of the loss. (*Grover & Grover* v. *Mathews; Vandepitte* v. "*Preferred Accident.*")

This principle appears to have been rigidly applied in fire and accident insurance, though there have been cases in marine insurance which support the contention that ratification may take place after loss.

Cases where a person acting or purporting to act as an agent has effected insurance without authority of the principal must be distinguished from those of bailment. In the case of bailment the relationship is between principals and the interest of the bailee in the property of the bailor (e.g. as furniture warehousemen, garage proprietor, etc., for goods in his custody or control) supports an insurance effected by the bailee on the property and enables the bailee to recover thereunder

for the benefit of the bailor in cases where the insurance is not limited to the bailee's responsibility—see Insurable Interest.

Under burglary or householders' policies, in which extensions are provided in respect of the goods of visitors, servants, and members of the insured's family, it cannot be said that the insured has an insurable interest in such loss or liability. The enforcement of a claim therefore depends upon whether or not there has been ratification before loss. (*Vandepitte* v. "*Preferred Accident.*")

In the case, however, of third party claims for which liability cover is provided for authorized drivers by extension clauses of motor policies, statutory provision is made by Section 36 (4) of the Road Traffic Act, 1930, for the enforcement of the policy by an authorized driver irrespective of ratification (*Tattersall* v. *Drysdale*); but if the policy can be avoided as between insurer and insured owing to misrepresentation the insurers are not precluded by Section 36 of the Act from denying the indemnity to other persons ("*Guardian*" v. *Sutherland and anr.*), nor can the authorized driver enforce his claim if he has failed to comply with the conditions of the policy, even if he is not cognisant of those conditions (*Austin* v. "*Zurich*").

(3) THE AGENT

There are, broadly speaking, three classes of agents with which the law of insurance is concerned, viz.—

(1) Agents for a particular duty or class of duties;
(2) Agents for a particular transaction or class of transaction;
(3) General agents;

and the nature of their employment limits the authority of each of these classes, unless extended by the conduct of the principal.

Agents for a Class of Duties

The first class includes the clerks and salaried officials employed by the insurers for clerical duties and office routine; it also includes persons who are appointed to introduce business on commission, i.e. "insurance agents" and "brokers."

The principal is responsible for the manner in which these agents perform their duties; thus, if a clerk who is employed to attend to the incoming post mislays a letter through carelessness, the insurers are nevertheless deemed to be acquainted with its contents. If an "insurance agent" incorrectly conveys the facts disclosed by the insured, and, relying on the inaccurate particulars, the insurance is granted, the insurers cannot repudiate the contract. (*Bawden* v. "*London Edinburgh*"; *Thornton-Smith* v. "*Motor Union.*")

The authority of each of these agents is definitely limited to the duties concerned with their employment, unless the authority is extended by the conduct of the insurers. A clerk has no authority to bind the insurers by accepting an insurance unless the insurers by their conduct have held out that he is their agent for that purpose. An agent employed to introduce business cannot grant temporary insurance or receive the premium on behalf of the insurers,

unless he is given authority for such purposes, i.e. has been furnished with cover notes for issue where required, or has from time to time granted cover which the insurers have confirmed without comment (*Murfitt* v. "*Royal*"), or has been permitted to collect premiums and remit them to the insurers less his commission.

Agent for a Class of Transactions

The second class includes the inspectors and representatives of the insurers who are employed to appoint "agents," to assist in the negotiation of business, and to arrange the terms of insurance; it also includes district agents and brokers appointed by the insurers to represent their interests in a particular district or in a particular class of business, with power to appoint sub-agents and generally to carry out duties connected with the development of the business of the insurers.

Though the insurers may limit the express authority of such an agent he is deemed to possess apparent authority for all matters incidental to his employment, e.g. he may determine the limits of disclosure required from the proposed insured (*Bawden* v. "*London Edinburgh*"; *Thornton-Smith* v. "*Motor Union*"), explain the meaning of the questions on the proposal form, and put the answers into shape. He has no authority, however, to invent the answers to the questions or to vary the terms of the insurance. (*Biggar* v. "*Rock Life*"; *Newsholme Bros.* v. "*Road Transport*.") He may also have authority to issue temporary cover pending the decision of the insurers as to acceptance of the risk, but is not empowered as a rule to accept the insurance. His authority would probably include the power to receive premiums, to receive notifications of loss, and to arrange the settlement of claims. The power to receive premiums, however, does not necessarily give such an agent authority to grant credit or to bind the insurers to the renewal of a policy.

Within this class also falls the agent employed by the insured to effect an insurance on his behalf. Such an agent has authority to bind the insured to pay the premium, and the insured is responsible for the agent's failure to disclose material facts. The agent's authority ceases, however, when he has effected the insurance; he has no power, therefore, to receive payment of a claim, or to terminate the insurance during currency unless authorized by his principal.

The authority of such agents may in all such cases be extended by express instructions, or by the conduct of the principal. It is necessary, therefore, to have regard to usage, methods of business, and the circumstances of each case in order to ascertain more precisely the extent of the authority in relation to a particular act or transaction.

General Agents

The third class consists of persons employed to represent their principals and invested with general authority to act on their behalf. They include the directors, management, and underwriters of an insurance company, the branch managers and principal foreign

agencies. In the case of a group of underwriters, it would include the underwriter who accepts business for the group. (*Hambro* v. *Burnand.*)

Agents who have such authority, or are represented to have such authority, have power to accept insurances, issue policies, settle claims, waive disclosure or any breach of condition, and, in fact, generally to act for all purposes in respect of the business in which they are employed. (*Hambro* v. *Burnand.*) Their authority does not extend, however, to matters outside the scope of the business of their employers, e.g. they cannot bind a company to insurances outside the scope of its Memorandum of Association.

Rights, Duties, and Liabilities of the Agent

The position of an agent is that of an intermediary between principals, acting for one or the other or both principals in making the contract or in matters connected therewith.

If his duty or duties have been duly and properly performed, he thereupon ceases to be involved in the transaction; the contractual rights and liabilities are matters directly appertaining between principal and principal alone; and the agent is free of any duty or liability until he is again required to act for a principal.

The rights of the agent are chiefly those which concern the reward for the services which he renders, and, as he is employed by his principal for these services, such rights, therefore, are a matter between himself and his principal alone.

If, however, the agent in the performance of his duties acts wrongfully or negligently, or fails to act at all, it may not only involve his principal in a liability to third persons and/or deprive the principal of his rights, but may also involve the agent in a personal liability not only to his principal, but also to third persons affected.

Rights of the Agent

The rights of the agent against the principal are as follows—

1. The right to receive the agreed remuneration for his services.

Agents employed to introduce business to the insurers are usually remunerated by commission upon the amount of the premium. This commission is deemed to be paid by the insured for the services rendered by the agent in effecting the insurance, though in practice, the agent receives payment by deducting a percentage of the premium before paying over to the insurers.

2. The right to be reimbursed any payments made on behalf of the principal.

If the agent himself pays the premium on the insurance he has been instructed to effect, he is entitled to repayment from the insured.

3. The right of lien.

If the agent has himself paid the premium and obtained the policy from the insurers, he can refuse to hand it over to the insured until he has been reimbursed.

The rights of the agent depend upon the due and proper performance

of his duties. He, therefore, forfeits his rights if he commits a breach of duty (e.g. delay or non-disclosure), by which the principal is prejudiced, or if he arranges an insurance differing from that which he has been instructed to effect, or effects an unauthorized insurance which the principal is not prepared to ratify.

Duties of the Agent

It is the duty of the agent to act with reasonable care and skill on behalf of his principal, and his failure to do so is a breach of duty.

In particular—

1. He must carry out the transaction which he is authorized to arrange, or, if he cannot do so, he must advise the principal without delay in order that the latter may not be prejudiced by the failure of his agent.

Thus, if the insurers are not prepared to accept the insurance, the agent commits a breach of duty if he fails to advise the proposed insured promptly.

2. He must strictly follow the instructions of his principal unless expressly authorized to use his discretion.

If he is allowed discretion, he must exercise it with reasonable care; it is not a breach of duty merely that it subsequently transpires that he exercised his discretion wrongly or could have exercised it more advantageously to the principal. Thus, an agent who is at full liberty to exercise a choice of insurers, and effects the insurance with a company of reasonable stability, is not responsible for loss incurred by the principal through the subsequent financial failure of the insurers; nor is he bound to seek the lowest premium.

3. He must perform his duties honestly.

He must not, therefore, enter into collusion with the insurers by taking a secret commission. (*Swale* v. *Ipswich Tannery Co.*)

The allowance of commission to a professional agent by deduction from the premium is a matter of usage, and is deemed to be paid by the insured, but the taking of commission by an employee without the knowledge of his employers might be a breach of duty. (*Swale* v. *Ipswich Tannery Co.*)

4. He must act diligently.

It is a breach of duty if the policy is void by the fraud or concealment of the agent.

If he is authorized to collect on the principal's behalf the amount due under the policy, he must collect it promptly.

The standard of skill which the agent is called upon to exercise varies. The degree of skill expected from a broker or other professional agent is measured by the degree of skill which would be exercised by other agents in his profession, but a non-professional agent is only called upon to act with the skill which an ordinary person would be expected to show.

The agent must act personally in the execution of his duties, unless he is authorized to delegate his duties, or unless in the ordinary course of business it is customary to do so. He will, therefore, be

responsible to his principal for any breach of duty on the part of a person improperly delegated to do work which the agent had been instructed to perform personally.

LIABILITIES OF THE AGENT

The agent may incur responsibility either to his principal or to a third person in consequence of a breach of duty.

Towards the principal his position in the event of a breach of duty is as follows—

1. He is liable for the loss sustained by reason of the breach of duty.

Thus, if he has failed to effect the insurance and omitted to notify his principal of his failure, or has given erroneous professional advice (*Sarginson* v. *Keith Moulton*), or has by fraud or concealment caused a breach of condition by which the insurance is avoided or fails to apply to the loss, the principal may sue him for damages.

2. He forfeits his rights against the principal.

Thus, if he has paid the premium for an insurance which is ineffective owing to his breach of duty, he cannot claim reimbursement from the principal, nor is he entitled to commission.

3. If the breach of duty is sufficiently grave, an agent employed under contract for a period may be liable to summary dismissal.

Towards a third person an agent owes no duty to exercise care and skill, since those duties arise out of the contract of agency and are therefore owed only to the principal. Thus an agent employed by the insured to effect an insurance, is not responsible to the insurers for the quality of the risk; nor is he responsible to them for non-disclosure of material facts, nor for misrepresentation, provided he acted honestly and innocently. If he acts wilfully, however, with the result that a third person suffers detriment, he may be liable in damages to the third person, e.g. if the agent of the insurers wilfully misrepresents the financial position of the company and so induces a person to insure, or if the agent of the insured fraudulently misstates material facts.

The agent may also incur liability to third persons through acting without authority. If, therefore, the agent of the insurers effects an unauthorized insurance, e.g. a policy which is *ultra vires*, and the insured is therefore unable to recover his loss from the insurance company, the insured may sue the agent for damages for breach of warranty of authority. Likewise the agent of the insured who effects an unauthorized insurance, by reason of which the insurers suffer loss, may be liable to the insurers.

The agent, being ordinarily an intermediary, is not personally liable for the payment of the premium, unless he undertakes personal responsibility for payment, or is himself interested in the insurance, or is personally liable by usage. By the custom of Lloyd's, the Lloyd's broker is personally liable to the underwriters for payment, and in turn the broker dealing with a Lloyd's broker is personally liable to the latter. If, as agent of the insurers, the agent has collected the premium from the insured, he is liable to account to his principals.

(4) IMPUTED KNOWLEDGE

In view of the considerable extent to which agency is a factor in a contract of insurance and all matters connected therewith, the knowledge of the agent in acting on behalf of his principal is of material importance.

For the purposes of the transaction upon which the agent is employed, the knowledge of the agent is, broadly speaking, presumed to be within the knowledge of his principal (compare *Bawden* v. "*London Edinburgh*" and *Thornton-Smith* v. "*Motor Union*" with *Biggar* v. "*Rock Life*"; and *Newsholme Bros.* v. "*Road Transport.*") The extent to which this principle can be applied is important not only in the case of the making of the contract, but also in connection with any matter which arises out of the contract. (*Marsden* v. "*City & County.*")

A third person dealing with a principal through the medium of the latter's agent is therefore entitled to assume—

1. That the agent is possessed of the knowledge of his principal for the purposes of the transaction in which he is engaged and in which knowledge is material.

If therefore the agent fails to disclose to the third person information which it is the duty of the principal to disclose, the actual ignorance of the agent does not excuse the principal. The knowledge of the *principal* is said to be "imputed" to the *agent.*

2. That the agent has advised or will advise his principal of all material facts which come to his knowledge in the course of the transaction upon which he is engaged, if they are such as it is his duty to communicate to the principal.

The knowledge of the *agent* is said to be "imputed" to the *principal*, and the failure of the agent to impart this knowledge does not excuse the ignorance of the principal. (*Bawden* v. "*London Edinburgh*"; *Thornton-Smith* v. "*Motor Union.*")

Knowledge of a particular fact by the agent at a time prior to the transaction, however, is not imputed to the principal, unless it was the duty of the agent to retain such knowledge until it became material. Nor is such knowledge imputed to the principal in the case of an agent engaged by the principal in some other transaction; thus, advice of a material fact to a solicitor engaged by the insurers in litigation is not imputed to the insurers for the purposes of a subsequent insurance in respect of which the solicitor had no part as agent. Neither would the rule apply where the third person concerned knows that the agent has not advised or does not intend to advise his principal.

In connection with a contract of insurance, the intermediary between insured and insurers is often an agent of the insured for some purposes, e.g. disclosure, and an agent of the insurers for other purposes, e.g. collection of premium. It is not always easy to determine, for the purposes of a particular point at issue, whether the agent has acted for the insured or the insurers; and therefore the onus of proving the

existence of agency for the purpose of such a point rests upon the person seeking to rely upon the doctrine of imputed knowledge.

Agent of the Insured

The knowledge of the agent may be material in any matter at any time connected with the contract of insurance, but so far as the agent of the insured is concerned it affects chiefly the duty of disclosure when the contract is being effected.

With regard to disclosure, the insured is responsible when acting through an agent just as much as if he were acting personally. If the policy, therefore, becomes void through any non-disclosure or misrepresentation by the agent, it is no excuse that the agent did not regard a fact as material, or intentionally concealed certain facts on his own initiative (*Biggar* v. "*Rock Life*"); or, that the insured having expressly instructed the agent to give full and proper information, the agent omitted to do so; or, that the agent was ignorant of the true facts. If the insured omits to communicate to the agent the material facts which should be disclosed to the insurers, the validity of the contract is judged not from the agent's state of knowledge, but from the knowledge which is or should be in the mind of the insured.

In certain cases the knowledge which should be within the mind of the insured may be known only to an agent of the insured, e.g. where an agent is employed by the insured for the care and management of the subject-matter. If it is the duty of the agent by reason of his employment to keep the insured informed of the state and condition of the subject-matter, then his knowledge is imputed to the insured, and the failure of his agent to inform him does not alter the position in relation to disclosure, whether he acts personally or engages the same or another agent to effect the policy.

Distinction must be drawn between the agent who is employed to effect the insurance and persons to whom the insured refers the insurers for information. The latter are not necessarily his agents, so as to impute their knowledge to the insured and render him responsible for its inaccuracy.

The doctrine of imputed knowledge may operate at other times than during the negotiations for the policy. Thus, if the agent holds the policy, the knowledge of its terms and conditions which are possessed, or deemed to be possessed, by the agent are imputed to the insured. Moreover, if in the event of loss the insured employs an agent to prepare particulars of the loss, and the agent puts forward information which he knows to be false, the insured is deemed to be acquainted with its inaccuracy, and his claim may therefore be treated as fraudulent.

Agent of the Insurers

From the fact that the insurers generally act by means of their agents at all times, it follows that the application of the doctrine of imputed knowledge is of importance in any matter arising in connection with the insurance. (*In re "Universal," Forbes & Co's claim.*)

Therefore, in so far as he is acting within the scope of his express or apparent authority, the agent may commit the insurers not only by waiving or limiting the duty of disclosure, but also by waiving the breach of a condition, accepting notice of loss (*Marsden* v. *"City & County"*), assigning the policy or altering its terms, or by receiving any material information. The fact that the insurers are not advised, or that the act of the agent does not come to their knowledge, does not relieve the position of the insurers. It is, however, open to them expressly to provide for such contingencies in the policy, e.g. by requiring direct notice of any alteration, or of any loss; and in such a case notice to the agent of the insurers is not an observance of the condition, unless the agent duly advises the insurers.

So far as the duty of disclosure is concerned, the submission of material facts to an agent acting within the scope of his authority is, in the absence of any express provision, a submission to the insurers themselves. If, therefore, a full disclosure is made by the insured or his agent to the agent of the insurers employed to conduct the negotiations on their behalf, the insured is not responsible if the agent of the insurers transmits to them inaccurate information, or by oversight or intention omits any material facts; the agent's omissions or inaccuracies, therefore, would not affect the validity of the policy. (*Bawden* v. *"London Edinburgh"*; *Thornton-Smith* v. *"Motor Union"*; *in re "Universal," Forbes & Co's claim.*)

Moreover, the insured is entitled to assume, when disclosing facts to an agent of the insurers, that the agent will transmit to the insurers material information within his knowledge. Whilst, therefore, an omission by the insured to disclose such information, if dealing directly with the insurers, might invalidate the policy, there would be no avoidance if the insured was dealing with an agent of the insurers who already possessed such knowledge when employed to conduct the negotiations on their behalf. (*Bawden* v. *"London Edinburgh."*)

The agent of the insurers employed to conduct the negotiations also has authority to decide the limits of disclosure. If, therefore, he advises the insured that certain information is unnecessary, or that the information given is sufficient, the insurers cannot challenge the validity of the policy on the grounds that the information was incomplete. Thus, if their agent advises the proposed insured that it is unnecessary to notify the fact of a previous refusal or declinature, there is no concealment on the part of the insured. (*Thornton-Smith* v. *"Motor Union."*) Their agent's knowledge is not imputed to the insurers, however, where in collusion with the insured he conceals or misrepresents material facts.

For the convenience of business, insurers generally use proposal forms setting forth the points upon which they require information in order to decide whether to accept the insurance. Though it is intended that the insured or his agent shall complete and sign the form of proposal, it is not uncommon to find that several of the questions are in the handwriting of the agent of the insurers who conducts the negotiations on their behalf. Careful distinction is

necessary as to whether in inserting the answers he is acting as the agent of the insurers, or is constituted the agent of the insured.

The agent of the insurers is empowered to explain the meaning of the questions in the proposal form, and to advise the insured as to the nature of the reply required or the necessity for a reply. If, therefore, there is a concealment or misrepresentation of fact by the failure of the agent properly to advise the insured, it does not become a breach of duty on the part of the insured, if he had no reason to believe that his answers were inaccurate or inadequate, and, therefore, does not affect the validity of the policy. This applies even where it is warranted that the answers are true and are to form the basis of the contract. (*Bawden* v. "*London Edinburgh.*")

The proposed insured is responsible, however, where he has signed the proposal without taking due care to see that answers to the questions are accurately or adequately furnished. Thus, if the agent fills up the form without asking for information, invents the answers, or inserts answers false to his knowledge, the proposed insured in subsequently signing the form must correct any answers which to his knowledge are inaccurate or incomplete. (*Biggar* v. "*Rock Life*"; *Newsholme Bros.* v. "*Road Transport.*")

Where the proposed insured signs the form, relying upon the agent subsequently to fill in the answers, he is likewise responsible if the agent enters inaccurate answers through ignorance or misapprehension, but not if he has fully advised the agent as to the correct answers, and the agent nevertheless inserts answers false to his knowledge, In the latter case the knowledge of the agent is imputed to the insurers, there being no failure on the part of the insured.

(5) PAYMENTS

In practice, the payment of premiums in respect of insurances, or of the renewal of insurances, is mostly made through the agent or broker who introduces the business to the insurer. Claims are generally paid directly to the insured, except in the case of insurances at Lloyd's.

Whether payment to an agent constitutes valid payment to the principal depends, both with premiums and losses, upon the existence of express or apparent authority of the agent to receive payment, and upon the form in which the payment is made. Subject to these two points, payment to an agent is equal to payment to the principal himself, whether or not he eventually receives the money from the agent.

Authority

The authority of the agent to receive payment may be gathered from the conduct of the principal.

The ordinary course of business between insurers and agents may be sufficient to show that he is their agent to receive premiums, though for other purposes the agent may be acting on behalf of the insured; e.g. the fact that he is debited in account with all premiums and periodically settles with the insurers.

The possession of the policy by the agent, to hand over in exchange for the premium, or of a renewal receipt which he signs upon payment (*In re "Economic"*), is sufficient to show his authority, and this authority may extend to subsequent payments after his agency has been terminated by the insurers, unless the insured has knowledge that the authority has been withdrawn.

So far as claims are concerned, the authority of an agent to receive payment may sometimes be implied from his possession of the policy.

FORM

Payment, either of premium or of a claim, is due in money, unless the payee agrees to accept any other form of payment. The debtor, therefore, who makes a payment to a duly authorized agent of the principal only discharges his liability by a payment in money, unless he can establish that the agent was authorized to receive payment in any other form; it will, however, be sufficient to show that payment in another form was within the usual course of business between debtor and creditor.

When the agent authorized to receive payment himself pays the amount due to the creditor before receiving payment from the debtor, the position of the debtor depends upon whether the agent has agreed to grant him credit. If the agent, having made an agreement with the insured to grant credit, pays the premium to the insurers, the payment binds the insurers; the agent then becomes creditor to the insured for the amount advanced. When such an agreement to grant credit exists it is sufficient to bind the insurers if the agent has been debited by them with the premium for settlement in his periodic account. In the absence, however, of any agreement to grant credit, the insured cannot take advantage of the business relations between agent and principal, and the fact, therefore, that the agent has paid the premium to the insurers, or has been debited in account, does not then constitute a valid payment by the insured himself.

LLOYD'S

The time-honoured customs of Lloyd's create relations between insured and insurers somewhat different from those which are usual with other insurers in similar circumstances. The relationship between broker and underwriter is that of two principals, not of principal and agent, and the law will uphold this custom against third persons dealing with Lloyd's, provided it is not unreasonable in its effect.

The underwriter, therefore, looks to the broker, and not to the insured, for the payment of the premium. The premium is treated as having been paid when the contract has been made and the broker debited in account. The custom also applies as between Lloyd's broker and the country broker from whom he receives instructions for contracts of insurance. Beyond that the ordinary rules of law apply in respect of any intermediary between the insured and the broker who effects the insurance at Lloyd's.

The custom, however, would be unreasonable to the insured if it

were applied to the payment of claims. When the insurance has been effected, privity of contract is established between the insured and the underwriter. The insured is, therefore, entitled to disregard the custom when claiming under the policy, and is subject to the ordinary rules of law, that is to say, he can look direct to the underwriter for payment, unless he has given an agent express or implied authority to collect the money due.

In practice, the claim under a Lloyd's policy is paid to the insured by the broker. Between underwriter and broker premiums and claims are debited and credited. and a settlement in account is made monthly or quarterly. Notwithstanding the insured's right to look direct to the underwriter for payment, the insured may be bound by a settlement in account, and the underwriter thereby discharged, if the insured has expressly authorized the broker to receive payment in such form, or if the broker's authority to receive payment may be implied by the insured's acquaintance with the usage of Lloyd's, or by the insured demanding payment from the broker.

In order to grasp more readily the application of Principles to Practice, readers are strongly advised, when reading the text, to refer forthwith to the Alphabetical Appendixes when cases and statutes are quoted.

CHAPTER VII

REINSURANCE AND RESERVES

MEANING and effect of reinsurance—Types—Direct lines—Good faith—Guarantees—Treaties—Nature of Treaties—Offer and Acceptance—Claims—History of Reserves—Specific reserves—Reserve for unexpired risks—Reserve for outstanding claims—Free reserves.

For Cases and Statutes cited herein, see Appendixes

(1) REINSURANCE

REINSURANCE is a procedure between insurers by which the insurer immediately accepting an insurance makes a contract with another insurer to accept part or the whole of the risk under the original insurance. The rights of the policyholder to recover from the original insurer to the full extent of the cover provided are unaffected by the contract of reinsurance.

TYPES OF REINSURANCE

When the insurer arranges to "cede" part of his risk, the cession accepted by the reinsurer becomes the subject of a facultative guarantee policy or a reinsurance treaty. The reinsurer may in turn reduce his liability by placing off or "retroceding" with another reinsurer. Retrocessions are sometimes the subject of further retrocession to the extent that a serious loss may financially involve a considerable number of insurers, not only in this country but also abroad.

DIRECT LINES

Distinction must be drawn between a reinsurance and a "direct line." In the case of certain risks of considerable magnitude it is found impossible for the original policyholder to effect cover with one insurer to the full extent of his requirements. The insurer, having determined the amount of loss which he is individually prepared to suffer, i.e. his net retention, has to determine the full extent to which he can interest his reinsurers by guarantee or treaty before deciding for what amount he can issue a policy, i.e. before deciding his gross retention. If this is insufficient for the policyholder's requirements or if, for other reasons, one contract of insurance cannot be arranged, the situation is often met by arranging for the policyholder to take out further policies with other direct insurers, i.e. a series of "direct lines," each of which stands alone, and must be individually enforced by the policyholder. Direct lines are arranged by the broker or agent placing the risk, usually with the assistance of the insurer having the major or original interest, i.e. the "leading office."

GOOD FAITH

A contract of reinsurance, whether by way of a guarantee policy or treaty, is subject to the same principles as a contract of insurance.

Good faith must be exercised between insurer and reinsurer. Thus the insurer is under a duty to disclose any undesirable elements in the original proposal or any special omissions or additions in the original insurance, unless the reinsurer has agreed to waive disclosure. The degree of this duty of disclosure, however, must depend upon the nature of the reinsurance. An excess of loss or surplus treaty upon a portfolio, i.e. upon the whole scope of a particular class of business, good, bad or indifferent, would invoke disclosure of general details, e.g. past claims experience of the portfolio rather than the merits of individual proposals. In a surplus treaty the acceptance of a line by the reinsurer is contingent upon the retention of a similar line by the reinsured at his own risk—or as may be otherwise agreed—and failure in this respect would invalidate the reinsurance. The enforcement of the reinsurance between parties rests upon its terms and conditions, independently of the rights between policyholder and insurer. Moreover, the original policyholder has no direct rights against the reinsurer; in the winding up of the insuring company the proceeds of a reinsurance policy are available to the creditors as general assets.

Guarantees

A facultative guarantee policy is a contract of reinsurance in connection with a specific insurance or insurances and is usually a simple undertaking to guarantee such part of the original insurance as may be agreed. Between insurance companies the normal facultative guarantee is a continuing contract, i.e. it follows the original insurance year by year unless a specified period of notice is given by the reinsurer of a desire to discontinue. Strictly a loss is recoverable under the guarantee only if the original insurer is liable to its policyholder, but in practice the reinsurer would seldom fail to follow the settlements of the insurer even if such were *ex-gratia* or by way of compromise.

Treaties

Reinsurance treaties are effected for a series of transactions of a particular class. Thus, under a "line" or "surplus" treaty for burglary insurance, the reinsurer undertakes to accept part of the insurer's risk, i.e. the "surplus," to the extent of a fraction of or one or more times the insurer's net retention, i.e. so many lines. There may be a series of such reinsurers according to the requirements of the insurer. Protection to the insurer depends upon the terms of the treaty; usually the protection applies immediately upon commencement of the direct risk. The insurer enters each particular cession on a list of cessions, i.e. on a "bordereau." Copies of the bordereaux are forwarded to the reinsurer from time to time as may be specified in the treaty, giving particular details of each cession, but even this requirement may be dispensed with by agreement between insurer and reinsurer. Another common form of treaty is the Excess of Loss Treaty for protecting the insurer for loss in respect of a stated amount in the event of any large loss arising out of one event. Thus in Motor insurance the insurer

may wish to limit his net loss for any one accident, to, say, £1,000. The reinsurer undertakes to pay a large sum, or perhaps any sum, in excess of that amount in connection with each loss incurred in the Motor portfolio, the reinsurance premium being based upon a fraction of the portfolio premium. The Excess of Loss Treaty is used for many other forms of accident insurance, e.g. Employers' Liability and General Third Party. Such treaties may form the subject of retrocessional treaties, whereby in turn the reinsurer limits his own loss.

Nature of Treaties

The type of treaty suitable for any particular class of Accident business depends upon the nature of the portfolio. If unlimited indemnity is given under every policy, e.g. Motor, Employers' Liability, and consequently any policy could give rise to a serious claim, the majority of insurers would effect an Excess of Loss Treaty as a means of avoiding any violent fluctuation in the result of each year's underwriting. For the same reason an Excess of Loss Treaty would more commonly be effected where a large number of insurances of a particular class, e.g. General Third Party, Horse-drawn Vehicles, grant an indemnity for an amount unrelated to the value of the insured's own property and substantially greater than the insurer is prepared to bear at his own risk for a series of individual claims. On the other hand, with a portfolio where the indemnity is related to the value of the insured's own property and where only a minority of policies is likely to give rise to claims for a substantial amount, e.g. Burglary, it is not essential to relate the reinsurance treaty to each and every insurance in the portfolio, but only to those which may involve a loss greater than the net amount which the insurer is prepared to incur. Consequently the "Surplus" Treaty is the more usual form of protection in such circumstances, the retention of the insurer then being governed either by a determined series of office limits according to the type of property, trade, etc., or by the discretion of the underwriter in respect of each individual acceptance.

Reinsurance treaties vary considerably in their terms and conditions, especially as regards the nature of the cessions, control of claims and regulation of accounts, but it is commonly the principle to stipulate that the reinsurer shall follow the fortunes of the insurer. This is of special importance in that it is impracticable for the insurer to furnish all relevant particulars of each insurance which may form the subject of cession, nor can the insurer forecast all instances under which a loss may have to be paid to the policyholder notwithstanding that the circumstances may not denote the strict liability of the insurer under its policy. The terms of the treaty may, therefore, render it necessary for the reinsurer to pay his share of all loss settlements, whether *ex-gratia* or by way of compromise or otherwise, but recovery from the reinsurer cannot be enforced at law if the original insurance is void for want of insurable interest, e.g. is a contract of wager or "honour" policy.

Offer and Acceptance

The formal procedure for effecting a contract of facultative guarantee is an offer by means of a "request note" and an acceptance by means of a "take note," followed by the issue to the reinsurer of a specification giving particulars of the risk, and the issue by the reinsurer of a Guarantee Policy. Both offer and acceptance, however, may be and frequently are informal, i.e. by letter or verbal.

Offer and acceptance similarly attend the making of a reinsurance treaty, but there may ensue lengthy negotiations before all the terms and conditions of the treaty are finally agreed and embodied in a written contract.

Claims

In the absence of any special stipulation the reinsurer is entitled to proof of loss by the insurer; the reinsurer can avail himself of any points which may have been open to the reinsured as against the original insured; the reinsured cannot, without the sanction of the reinsurer, renounce his rights to the prejudice of the reinsurer. It follows that the reinsurer is also entitled to the benefit of rights of subrogation exercisable by the reinsured, who must account to the reinsurer for his share of any recovery if effected. As previously mentioned, however, there are usually special conditions in reinsurance treaties governing claims settlements.

(2) RESERVES

An essential quality in a contract of insurance is the ability of the insurer to meet a loss when it occurs. Under a Life Policy the contract may be to pay a sum of money over forty years hence. The existence and financial stability of the insurer when payment is due are of vital importance to a policyholder who has steadily paid a series of substantial annual premiums during the intervening period. In other classes of insurance, Fire, Marine, Accident, the majority of contracts are for risk arising from year to year, and the need for long term financial stability may not be so acute, but even so there are classes of business—particularly Annuity and Personal Accident—which may give rise to a liability to make a series of payments over a considerable number of years.

History

A history of insurance reveals the decease of several hundred insurance companies in the last 200 years, the bulk of these having perished in the nineteenth century. The ease with which an insurance venture could be commenced for the immediate benefit of its promoters, without regard to the interests of the policyholders, became a matter of serious public concern following the collapse in about 1869 of two large Life Companies and led to legislation from 1870 onwards, which was eventually consolidated in the Assurance Companies Act, 1909. This Act governs the activities of companies,

concerns or individuals transacting in Great Britain Life, Fire, "Accident" (i.e. personal accident and disease), Employers' Liability, Bond Investment, and (as extended by the Road Traffic Act, 1930) Motor Vehicle business. A company is required to make one or more deposits of £20,000 (Motor £15,000) with the High Court; to keep a separate account of each class of business with each its own separate fund; to prepare annually in prescribed form a revenue account, profit and loss account, and balance sheet; and to submit all such statements in due time to the Board of Trade. Penalties and further provisions relating to sundry matters are contained in the Act. Certain modified provisions are made governing the activities of Lloyd's underwriters; mutual concerns transacting Employers' Liability business are exempt from the provisions of the Act. Insurance legislation of a similar character also prevails in Eire and Northern Ireland.

The intentions of the Act were to prevent the formation of "mushroom" concerns, to reveal the degree of stability of insurers from year to year and doubtless to arrest the trading of each moribund venture before serious loss could fall upon the public at large. Whilst the effect of the legislation was substantially to reduce the number of new formations, its other objects were not sufficiently achieved, and the weaknesses of the Act were more prominently revealed by the rapid growth of Motor Vehicle insurance business, owing to a number of company failures. Legislation giving the Board of Trade powers to investigate affairs and to stop further trading was passed in 1933 and 1935—the Assurance Companies (Winding Up) Acts—but such legislation was still regarded as insufficient to prevent failures through unsound trading. The reputation of British insurance, not only in this country but throughout the world, is of such importance that strong pressure was brought to bear for some years for more up-to-date legislation, resulting in the Assurance Companies Act, 1946.

Modern trading in insurance revealed the inadequacy of statutory deposits and annual submission of accounts as a preventative of insurance failures. Liabilities continue to exist long after the collection of premiums and the extent of those liabilities can be readily concealed or under-valued whilst trading continues for some years after an insolvent position has arisen, particularly in those classes of insurance where the need for payment of claims can be unduly deferred by dilatory treatment and unnecessary litigation, e.g. any form of Liability insurance. The new Act (see p. 33) abolishes the deposits mentioned above and substitutes minimum standards of share capital and solvency. It also extends the 1909 Act to Marine, Aviation, and Transit insurance.

Specific Reserves

The stability of an insurance company is largely judged by the adequacy of its reserves. Of these the essential items are—

Reserve for Unexpired Risks.
Reserve for Outstanding Claims.

In addition most companies have other reserves which have been built up year by year from the undistributed trading profit.

For the classes of accident business controlled by the Assurance Companies Act, revenue accounts in prescribed form have to show the reserves for unexpired risks and outstanding claims. It is the usual practice of companies to publish a revenue account on the lines of the prescribed form of fire revenue account embracing all other classes of accident insurance not specified in the Act. For personal accident insurance, companies also have to furnish detailed annual returns, showing particulars of the outstanding claims of each year and the eventual expenditure until final settlement.

It will be seen from a scrutiny of company accounts that the usual method with fire and accident business is to summarise the trading at the end of each financial year, showing liabilities and reserves. A different method is pursued at Lloyd's and in companies' marine accounts, a three-year system being adopted whereby the liabilities arising out of the premiums of each year are run off and each year's account closed at the end of the second year thereafter.

Reserve for Unexpired Risks

The bulk of fire and accident business is transacted under contracts which entail the payment of an annual premium for each year's risk. In fire insurance, policies are usually written to expire on one of the four quarter days. With accident insurance the practice varies, many policies being renewable at the anniversary of the commencing date. In both classes there is a residual period of risk under current periods of insurance after the close of the financial year in which the premium is paid. Assuming that the business is renewable at quarter days and the premiums are equally divided over the four quarters, the residual proportion at 31st December is—

Ladyday . .	$\frac{1}{4}$th of the portfolio with			$\frac{1}{4}$th of its period unexpired			
Midsummer .	$\frac{1}{4}$th	,,	,,	,,	$\frac{2}{4}$ths ,,	,,	,,
Michaelmas . .	$\frac{1}{4}$th	,,	,,	,,	$\frac{3}{4}$ths ,,	,,	,,
Christmas . .	$\frac{1}{4}$th	,,	,,	,,	$\frac{4}{4}$ths ,,	,,	,,

making $\frac{10}{16}$ths or $62\frac{1}{2}$ per cent in all. Taking into account a certain measure of short period insurance, and making a reasonable deduction for expenses already incurred, i.e. commission and acquisition costs, it is generally regarded that, for fire business, 40 per cent of the premium is a proper sum to set aside for unexpired risks. The earned premium for a particular year will therefore consist of the premiums paid in that year after reserving 40 per cent thereof for unexpired risks and taking credit for a like reserve made in the previous year. A reserve figure of 40 per cent is also regarded as adequate for accident insurance, even though in a particular class of business it may be possible to establish that a higher or lower percentage should be adopted by reason of the fluctuating incidence of premiums throughout the financial year or the existence of a greater proportion of short period contracts.

Reserve for Outstanding Claims

At the close of a financial year, numerous claims made in the year will not have been settled. The time at which payment under the policy is made depends on a number of matters, such as investigation of the loss, litigation with third parties, etc. Under many claims, part but not the whole of the expenditure may have been incurred. It is regarded as necessary to examine each and every outstanding claim at the close of each year in order to estimate the probable expenditure to be incurred with a view to aggregating these estimates and thereby arriving at a proper sum to reserve for outstanding claims.

The trading result for the year is then arrived at by setting the earned premium for the year against the claims cost, agents' commission and office expenses. The claims cost will consist of the actual expenditure in the financial year plus the reserve for outstanding claims less a similar reserve made in the previous year.

When calculating the total amount to be reserved it is necessary to take into account all unsettled claims, whether they arose in the current financial year or in previous years, as in the revenue account full credit is being taken for the previous year's reserve, a portion of which may still be representative of expenditure yet to be incurred in the second or subsequent year after the claim arose.

The extent of reserve necessary for unsettled claims varies substantially in each class of accident business. Where property damage is the only risk, e.g. burglary insurance, the reserve is not considerable, as such claims can be speedily settled and the reserve would relate mainly to claims in the last month or so of the financial year. The position is very different with liability risk, e.g. Motor, Employers' Liability, General Third Party. Negotiations and litigation may defer the main expenditure on a claim for a considerable time. In each of these classes the claims reserve approaches and may even exceed the total cash expenditure on claims, both new and old, in the financial year.

The human element arises very prominently when estimating the reserve for outstanding claims. Under-estimating is the readiest means of concealing adverse trading results. The Board of Trade Returns are designed to bring any such tendency into the limelight in respect of personal accident insurance, but no similar provision is made for motor insurance. In this latter class a company can continue to show a profit in its accounts over a period of some years of unprofitable trading by means of under-estimating its reserves until a point is reached where the deficiency has grown to such considerable dimensions that it can no longer be concealed. This was well illustrated in the first few years after the introduction of the Road Traffic Act by a number of substantial failures of companies writing this class of insurance.

Free Reserves

From a study of the revenue accounts and balance sheets of leading insurance companies it will be seen that, in addition to the reserves

mentioned above, there are a number of other "funds," i.e. reserves, and usually a "balance" at credit of profit and loss account, all these "liabilities" being accordingly represented by the assets of the company. These reserves have been built up out of undistributed profits over a considerable number of years, and indicate the financial strength of an office. Out of the profit and loss balance are paid the periodical dividends to shareholders.

Certain of these funds can be termed "specific reserves" rather than free reserves. Thus, there is usually an Investment Fund to provide against any undue fluctuation in the value of the investments, which can occur by reason of local or world events. There may also be specific reserves such as a pension fund.

In the trading for each class of insurance a company seeks by its reinsurance facilities to avoid any undue fluctuation of results from year to year. Nevertheless, there is always the possibility of a catastrophe, particularly in fire insurance, which may cause an overwhelming strain on the trading account of a particular year. In accident insurance there may arise at times a period of unprofitable trading before rates can be effectively adjusted. It is the practice of companies to build up free reserves in the revenue accounts, e.g. fire fund, employers' liability fund, etc., and in addition to have a general reserve fund which can be employed in any direction if the former are insufficient. As the "specific" reserves are made to meet known and roughly measurable liabilities and purport to be sufficient only for this purpose, the strength of a company in the matter of its ability to meet any unusual drain on its resources and the security accordingly furnished to policyholders for the distant as well as the immediate future may well be judged by the extent of its "free" reserves.

A further element arises in the finances of a company in what may be described as "hidden" reserve. An example of this is the difference between the outstanding claims reserve and the eventual claims cost; a further instance is the difference between book values of investments and their actual market value.

Reference should be made to the Assurance Companies Act, 1909 (not quoted in the Appendix) for the full statutory details of returns which have to be made to the Board of Trade, but see page 33 regarding employers' liability insurance.

APPENDIX I

CASES

In the following pages are given particulars of the circumstances and decisions in leading cases and/or extracts of dicta of the learned judges therein, the purpose being to illustrate the legal foundation for certain rules affecting the principles and law of accident insurance.

The cases have been set forth in alphabetical order, and are quoted with the kind permission of—

The Incorporated Council of Law Reporting for England and Wales.

The Times Publishing Company, Ltd.

The Law Times.

Lloyd's List.

Austin *v.* Zurich (1945), 61 T.L.R. 214

The plaintiff, Austin, was insured with the "Bell" for a motor car with the usual Third Party extension covering him whilst driving other cars. Aldridge was insured with the "Zurich" for a motor car with the usual Third Party extension indemnifying any person driving with his permission. Austin whilst driving Aldridge's car met with an accident resulting in the death of Aldridge and injury to another passenger. The "Bell" paid the third party claims, and by way of subrogation brought an action in the name of Austin to recover the expenditure from the "Zurich."

In connection with the accident Austin had been served with summonses for dangerous and careless driving. He had not given the "Zurich" notice thereof as required by a condition in their policy. He did not know the conditions of the "Zurich" policy, nor, having his own insurance, was he interested in knowing such conditions. It was contended that, not knowing of the condition, he was not bound by it.

It was held that although by Section 36(4) of the Road Traffic Act, 1930, Austin could claim indemnity under a policy to which he was not a contracting party, he must take the policy as he found it and a claim would fail unless he had complied with its conditions. The fact that he did not know of the conditions was immaterial.

Lord Greene, M.R.: "The clause in terms obliges the authorized driver to observe fulfil and be subject to the terms exceptions and conditions of this policy in so far as they can apply. Here is Austin endeavouring to take advantage of the indemnity which Aldridge's policy purports to give to him. He must take it (the policy) with all its disadvantages from his point of view, together with its advantages, and he cannot claim the benefit of anything which the document gives him without complying with its terms. Otherwise the result would be that the benefits conferred on the authorized driver would be better than the benefits conferred on the actual policyholder himself."

MacKinnon, L.J.: (*obiter*) "In truth, the claim of the "Bell" was one of contribution against the "Zurich" on the principle of double insurance, and such a claim ought to be brought in the name of the underwriters and the defendant underwriters."

BAWDEN *v.* THE LONDON, EDINBURGH & GLASGOW ASSURANCE CO., [1892] 2 Q.B. 534

B. insured with the company through their agent against accidental injury. The proposal contained a statement by the assured that he had no physical infirmity, and that there were no circumstances that rendered him peculiarly liable to accidents, and it was agreed that the proposal should form the basis of the contract between him and the company. By the terms of the policy, the company agreed to pay the assured £500 on permanent total disablement, and £250 on permanent partial disablement—the policy stating that by permanent total disablement was meant, *inter alia*, "the complete and irrecoverable loss of sight in both eyes," and by permanent partial disablement was meant, *inter alia*, "the complete and irrecoverable loss of sight in one eye."

At the time when he signed the proposal for the insurance the assured had lost the sight of one eye, a fact of which the defendants' agent was aware, though he did not communicate it to the defendants.

The assured, during the currency of the policy, met with an accident which resulted in the complete loss of sight in his other eye so that he became permanently blind.

Held, that it must be taken, first, that the assured had sustained a complete loss of sight in both eyes within the meaning of the policy; secondly, that the knowledge of the defendants' agent was under the circumstances the knowledge of the defendants, and that they were liable on the policy for £500.

NOTE.—John Quin was a local agent for the company and received commission upon insurances which he procured for them. Bawden was an illiterate man, and was almost unable to read or write, but he could write his name. Quin was aware that Bawden had only one eye. Quin filled up the blanks in the proposal at Bawden's dictation, and Bawden then signed his name to it.

Lord Esher, M.R.: "His (Quin's) authority is to be gathered from what he did. He was the agent of the company before he addressed Bawden. For what purpose was he agent? To negotiate the terms of a proposal for an insurance, and to induce the person who wished to insure to make the proposal . . . he was not merely their agent to take the piece of paper containing the proposal to the company. . . . He saw that the man had only one eye. The proposal must be construed as having been negotiated and settled by the agent with a one-eyed man. In that sense the knowledge of the agent was the knowledge of the company. . . ."

But see *Biggar* v. *Rock Life Assurance Company; and Newsholme Bros.* v. *Road Transport General Insurance Co.*

See also *Thornton-Smith* v. *Motor Union Insurance Co., Ltd.*

BECKER GRAY & CO. *v.* LONDON ASSURANCE CORPORATION [1918] A.C. 101

Lord Sumner: "It must be admitted that the terminology of causation in English law is by no means ideal. It would be the better for a little plain English. I think *direct cause* would be a better expression than *causa proxima*. Logically, the antithesis of proximate cause is not real cause but remote cause. Lord Ellenborough uses *causa causans* as its equivalent in . . .; Abbot, C.J., speaks of *immediate cause* in . . .; Lord Fitzgerald of *direct and immediate cause in* . . .; and my noble and learned friend Lord Loreburn of *direct cause* in. . . . Many similar expressions might be

quoted. Proximate cause is not a device to avoid the trouble of discovering the real cause or the *common sense* cause, and though it has been and always should be rigorously applied in insurance cases, it helps the one side no oftener than it helps the other. I believe it to be nothing more or less than the real meaning of the parties to a contract of insurance. . . ."

BIGGAR *v.* ROCK LIFE ASSURANCE COMPANY, [1902] 1 K.B. 516

A policy of insurance against accidental injury was effected with an insurance company through their local agent. The proposal form was filled up by the agent, many of the answers filled in by him being false in material respects; the false answers were inserted without the knowledge or authority of the applicant, who signed the proposal form without reading it. The proposal contained a declaration in which the applicant agreed that the statements in the proposal should form the basis of the policy and the policy contained a proviso that it was granted on the express condition of the truthfulness of the statements in the proposal. Shortly after payment of the premium the insured was accidentally injured.

Held, first, that it was the duty of the applicant to read the answers in the proposal before signing it and that he must be taken to have read and adopted them; and, secondly, that in filling in the false answers in the proposal the agent was acting, not as the agent of the insurance company, but as the agent of the applicant: and that therefore the policy was void.

Wright, J.: " . . . Cooper was an agent to receive proposals for the company. He may have been an agent . . . to put the answers into form; but I cannot imagine that the agent of the insurance company can be treated as their agent to invent the answers to the questions in the proposal form. For that purpose, it seems to me, if he is allowed by the proposer to invent the answers and to send them in as the answers of the proposer, that the agent is the agent, not of the insurance company, but of the proposer. . . ."

But see *Bawden* v. *The London, Edinburgh & Glasgow Assurance Co.;* and *Thornton-Smith* v. *Motor Union Insurance Co., Ltd.*

See also *Newsholme Bros.* v. *Road Transport & General Insurance Co.*

BOND *v.* COMMERCIAL UNION (1930), 36 Ll.L.L.R. 107

B, who had a motor-car insurance with the "Commercial Union," acquired another car in September, 1926, completed a new proposal for the new car, and was granted a fresh insurance. In March, 1928, B's son, a youth of about 18, whilst driving the car, collided with a cyclist, whose claim was eventually settled for £500 and costs.

In an arbitration in which Bond claimed indemnity under the policy, the company denied liability on the grounds that when the proposal form was filled in and the policy was granted, B's son was to his father's knowledge likely to drive the car and, further, that B's son had motoring convictions prior to the issue of the policy. The company contended that these were material facts which should have been disclosed. It was not a case in which there had been a misstatement or in which there had not been full answers to questions in the proposal form, because the proposal form was silent as to the facts which were not disclosed, and there was no indication in the proposal form that the disclosure of these facts was required. The arbitrator held that, in spite of the silence of the proposal form on the matter, the facts should have been disclosed to the insurance company, and that non-disclosure invalidated the policy.

On appeal, the Master of the Rolls (Lord Hanworth) said that it appeared to him it was plain that the arbitrator had applied his mind to the right problems which were before him. He had found that the facts mentioned were material circumstances to the knowledge of the insured to be disclosed, and that they were not disclosed. On the broad proposition of the contract of insurance being one in which there must be disclosure of material facts, the arbitrator was right in holding that the insurance company was not liable. The appeal must be dismissed.

BORRADAILE *v.* HUNTER, [1843] M. & G. 639

Maule, J.: "In construing these words, it is proper to consider, first, what is their meaning in the largest sense, which according to the common use of language, belongs to them; and, if it should appear that that sense is larger than the sense in which they must be understood in the instrument in question, secondly, what is the object for which they are used."

IN RE BRADLEY AND ESSEX & SUFFOLK ACCIDENT INDEMNITY SOCIETY, [1912] 1 K.B. 415

The claimant insured with the society against liability under the Workmen's Compensation Act, 1906. He employed only one person, his son, who was paid £75 a year. The son having been injured in the course of his employment, the plaintiff had to pay him compensation under the Act. The society refused to pay on the ground of non-compliance with a condition in the policy (which declared it and other clauses to be conditions precedent to the society's liability under the policy) requiring that a wages book should be kept, and that for the purposes of adjustment of the premium the wages should be declared within one month from the expiry of each period of insurance.

No wages book was kept by the claimant.

Held by the Court of Appeal, affirming the decision of the High Court, that the claimant was entitled to indemnity by the society from liability to pay compensation, as the sole object of the condition was to provide for the adjustment of premiums, and that compliance with the clause was not a condition precedent to liability.

Farwell, L.J.: "It is, in my opinion incumbent on the company to put clearly on the proposal form the acts which the assured is by the policy to covenant to perform and to make clear in the policy the conditions, non-performance of which will entail the loss of all benefits of the insurance. . . . It is, in my opinion, scarcely honest to induce a man to propose on certain terms, and then to accept that proposal and send a policy as in accordance with it when such policy contains numerous provisions not mentioned in the proposal, which operate to defeat any claim under the policy, and all the more so when such provisions are couched in obscure terms."

Fletcher-Moulton, L.J. (dissenting): "As the policy clearly and unmistakably pronounced the clause to be a condition precedent, there was no reason why it should be declared to be otherwise, and the society, therefore, was not liable." But see *London Guarantie Company v. Fearnley*.

BURNAND *v.* RODOCANACHI (1882), 7 App. Cas. 333

Lord Selborne, C.: "For the purpose of the contract of insurance and for the purpose of all rights arising from that contract, it may well be that the valuation in a valued policy is conclusive, and the effect of it may be

that for those purposes the assured is not entitled to say, 'My loss has been greater than that which has been covered by the policy.'"

CARLILL *v.* THE CARBOLIC SMOKE BALL COMPANY
[1892] 2 Q.B. 484 and [1893] 1 Q.B. 256

The defendants, the proprietors of a certain medical preparation called "The Carbolic Smoke Ball," issued an advertisement in which they promised to pay £100 to any person who contracted influenza after having used one of their smoke balls in a certain specified manner, and for a certain specified period. The plaintiff, upon the faith of the advertisement, purchased one of the defendants' smoke balls, and used it in the manner and for the period specified, but nevertheless contracted influenza.

Held, that the above facts established a contract by the defendants to pay the plaintiff £100 in the event which happened; that such contract was neither a contract by way of wagering within the Gaming Act, 1845, nor a policy within the Life Assurance Act, 1774; and that the plaintiff was entitled to recover.

Lindley, L.J.: "It is contended that it (the promise) is not binding. In the first place it is said it is not made with anyone in particular. Now, that point is common to the words of this advertisement and to the words of all other advertisements offering rewards. They are offers to anybody who performs the conditions named in the advertisement, and anybody who does perform the condition accepts the offer . . . the person who makes the offer shows by his language, and from the nature of the transaction, that he does not expect and does not require notice of the acceptance apart from notice of the performance."

IN RE AN ARBITRATION BETWEEN CARR AND THE SUN
FIRE OFFICE (1897), 13 T.L.R. 186

The plaintiff was the trustee in bankruptcy of Ralph Beauchamp, who was a partner in the firm of Beauchamp Brothers. In July, 1893, a fire occurred on the business premises of Beauchamp Brothers, which were insured by a policy issued by the Sun Office. The policy provided that notice of any loss by fire should be given within fifteen days. Beauchamp Brothers, finding that it would be impossible to prepare their claim within that short period, applied to the insurance company for an extension of time, which was granted. On 10th August, 1893, Beauchamp Brothers committed an act of bankruptcy, on which a receiving order was subsequently made. On 16th August, they sent in their claim, which was found to be exaggerated and fraudulent. A lengthy litigation ensued, which went up to the House of Lords with regard to the question whether a receiving order could properly be made against Ralph Beauchamp's partner in the business, Gilbert Walter Beauchamp, who was an infant. The plaintiff, having been appointed trustee in bankruptcy of Ralph Beauchamp in 1895, sent in a claim under the policy about a year and a half after the fire. The company resisted the claim, and the matter was referred to arbitration. An award was made in the form of a special case.

Lord Esher, M.R.: ". . . When the assured ultimately sent in their claim, the grant of further time was exhausted and had no further operation. No extension of time was ever given to the plaintiff at all. If the plaintiff was proceeding on the claim of the assured, their fraud hit him. If he was proceeding on his own claim, no time had been given to him, and he was too late. The rights of the company could not be affected by

the fact of time being occupied in taking up to the House of Lords litigation to which they were not parties."

The appeal, which was from a judgment in favour of the defendants, was accordingly dismissed.

CARTER *v.* BOEHM (1766), 3 Burr. 1905

Lord Mansfield, C.J.: "Insurance is a contract upon speculation. The special facts upon which the contingent chance is to be computed lie more commonly in the knowledge of the insured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstances in his knowledge to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risque as if it did not exist. The keeping back of such a circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived, and the policy is void; because the risque run is really different from the risque understood and intended to be run at the time of the agreement.

"But either party may be innocently silent as to grounds open to both to exercise their judgment upon. . . . There are many matters as to which the insured may be innocently silent. He need not mention what the underwriter knows. . . . An underwriter cannot insist that the policy is void because the insured did not tell him what he actually knew, what way soever he came to the knowledge. The insured need not mention what the underwriter ought to know, what he takes upon himself the knowledge of, or what he waives being informed of."

CASTELLAIN *v.* PRESTON AND OTHERS (1883), 11 Q.B.D. 380

A vendor contracted with a purchaser for the sale, at a specified sum, of a house which had been insured by the vendor with an insurance company against fire. The contract contained no reference to the insurance. After the date of the contract, but before the date fixed for completion, the house was damaged by fire, and the vendor received the insurance money from the company. The purchase was afterwards completed, and the purchase money agreed upon, without any abatement on account of the damage by fire, was paid to the vendor.

The plaintiff sued on behalf of the London, Liverpool & Globe Insurance Company to recover from the vendor a sum of £330, the amount of the claim paid by the insurers, who were at that time ignorant of the existence of the contract for sale.

Held, that the company were entitled to recover a sum equal to the insurance money from the vendor for their own benefit.

According to the doctrine of subrogation, as between the insurer and the assured, the insurer is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been, exercised, or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured, by the exercise of which right or condition the loss against which the assured is insured can be or has been diminished.

Brett, L.J.: "The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of *indemnity*, and of indemnity only. . . ."

COLEMAN'S DEPOSITORIES LTD. AND LIFE AND HEALTH
[1907] (*In re* an arbitration) 2 K.B. 798

An employers' liability insurance was effected, the policy containing a condition requiring immediate notice of accident. On 28th Dec., 1904, the employer signed a proposal form for the insurance and received a covering note, to which no conditions were attached. On 9th January, 1905, the insurers delivered a policy covering risk for 12 months for 1st January, 1905. On 2nd January a workman received injury, which was believed to be slight; no notice was given to the insurers at the time. Dangerous symptoms supervened, and the workman died on 15th March; notice of accident was given to the insurers on 14th March. The insurers denied liability on the ground (among others) of failure to give immediate notice and of that condition being a condition precedent by the terms of the policy. The employer settled the widow's claim, and referred to arbitration.

On appeal on a case stated by an arbitrator, it was held that in the absence of evidence that the insured knew of, or had the opportunity of knowing of, the existence of the condition at the date of the accident, the condition was one with which it was impossible to comply; that as regards a risk which resulted in a claim before the insured had knowledge of the condition, the true inference was that the insurers never imposed the condition on the employer and that the latter was therefore entitled to recover on the policy. Doubt was also expressed, on a construction of the particular wording of the policy, whether the condition was a condition precedent, giving the insurers a right to refuse the claim or a collateral condition entitling the insurers to a nebulous claim for damages.

But see *Austin* v. *Zurich* where a claim is made under a policy extension by a stranger to the contract.

CORNISH *v.* ACCIDENT INSURANCE CO. (1889), 23 Q.B.D. 453

Lindley, L.J.: "In a case on the line, in a case of real doubt, the policy ought to be construed most strongly against the insurers; they frame the policy and insert the exceptions. But this principle ought only to be applied for the purpose of removing a doubt, not for the purpose of creating a doubt, or magnifying an ambiguity, when the circumstances of the case raise no real difficulty."

COSFORD UNION AND OTHERS *v.* POOR LAW AND LOCAL GOVERNMENT OFFICERS' MUTUAL GUARANTEE ASSOCIATION, LTD.
(1910), 103 L.T. 463

A was appointed assistant overseer of the parish of H, and by virtue of his appointment under Section 17 (2) of the Local Government Act, 1894, he became clerk to the Parish Council of H. The defendants entered into a bond guaranteeing the faithful performance of his duties as assistant overseer. A committed defalcations in respect of moneys received by him as clerk to the parish council.

In an action to recover the amount of such defalcations under the guarantee given by the defendants—

Held, that the defalcations of A in relation to the Parish Council accounts were not covered by the terms of the bond guaranteeing the faithful performance of his duties in the office of assistant overseer.

DAWSONS, LIMITED *v.* BONNIN AND OTHERS (1922). 2 A.C. 413

A firm of contractors in Glasgow insured a motor lorry at Lloyd's against damage by fire and third party risks. The policy recited that the proposal

should be the basis of the contract and be held as incorporated in the policy, and it was expressed to be granted subject to the "conditions at the back hereof." By the fourth condition, "material misstatement or concealment of any circumstance by the insured material to assessing the premium herein, or in connection with any claim, shall render the policy void." In reply to a question in the proposal form, "State full address at which the vehicle will usually be garaged," the answer given was, "Above Address," meaning thereby the firm's ordinary place of business in Glasgow. This was not true, as the lorry was usually garaged at a farm on the outskirts of Glasgow. The inaccurate answer in the proposal was given by inadvertence. The lorry having been destroyed by fire at the farm garage, the insured claimed payment under the policy.

Held, (1) that the misstatement in the proposal was not material within the meaning of condition 4; but (2) that the recital in the policy that the proposal should be the basis of the contract made the truth of the statements contained in the proposal, apart from the question of materiality, a condition of the liability of the insurers; that the effect of this recital was not cut down by the special conditions on the back of the policy; and that the claim failed.

DERRY AND OTHERS *v.* PEEK (1889), 14 A.C. 337

In an action of deceit the plaintiff must prove actual fraud. Fraud is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false.

A false statement, made through carelessness and without reasonable ground for believing it to be true, may be evidence of fraud, but does not necessarily amount to fraud. Such a statement, if made in the honest belief that it is true, is not fraudulent and does not render the person making it liable to an action of deceit.

Making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds.

IN RE ECONOMIC FIRE OFFICE, LTD. (1896), 12 T.L.R. 142

J. W. Gaines & Co. claimed to prove in the winding up of the insurance office in respect of a sum alleged to be due under a fidelity guarantee policy, entered into by the office in respect of Goodyer, a traveller in the employment of the claimants. The premiums, according to the usual practice in such cases, were payable by the persons employed. Goodyer paid the first year's premium. At the expiration of a year, Gaines & Co. inquired of Goodyer whether he had paid the second year's premium, and requested him to produce the receipt for it. Goodyer had not paid the premium, and he accordingly asked the insurance company's agent at Nottingham to lend him the amount of the premium, and the agent agreed to do so, and gave him a receipt for the amount, which he sent to Gaines & Co. A note at the foot of the receipt contained words showing that it was contemplated that premiums would be paid by the person employed, and that the receipts would be shown to his employers. Goodyer afterwards absconded.

Vaughan Williams, J.: "The employment of Bartlett, the insurance company's agent at Nottingham, was an employment to receive premiums and give receipts for them. . . . The receipt was meant to be produced to the employers, and as the agent had the company's authority to give

receipts and acted within the scope of his authority in giving this receipt, the company could not be heard to say that the money had not been paid. The employers by acting on the receipt altered their position by continuing Goodyer in their employment, whereas, but for the representation contained in the receipt they would have dismissed him. There was clearly an estoppel, because the act of giving the receipt was an act done by Bartlett within the scope of his ostensible employment, that employment which he was held out as possessing."

Judgment was therefore given that the proof be allowed.

EWER *v.* NATIONAL EMPLOYERS' MUTUAL GENERAL INSURANCE ASSOCIATION, LTD. (1937), 53 T.L.R. 485

The plaintiff, who was insured under policies of fire insurance, sustained damage by fire to his premises, trade fixtures, stock and utensils. The plaintiff claimed for a declaration that the policies were valid. It was submitted by the defence that a claim of £893 for the goods was not a mere bargaining figure, but a fraudulent exaggeration.

Mr. Justice MacKinnon, in giving judgment in favour of the plaintiff, said—

"There were two defences that the policies were avoided owing to non-disclosure of material facts, and that the claim was so exaggerated as to be fraudulent. The defence of non-disclosure raised grave issues. In effect, the defendants said that when anyone through his broker or personally applied for a policy of fire insurance, he must disclose the fact that he had ever had a claim of any kind on a policy of any sort at any time in his life.

"The cases cited all turned on the fact that specific questions had been asked in the proposal form, and they were no authority for the wide proposition here contended for—that when a man was proposing or renewing an insurance on any subject-matter, he must reveal the fact that at any time in all his life he had had claims on policies covering a different kind of subject-matter.

"Then it was said that the claim was so exaggerated as to be fraudulent. As to that, he was not satisfied that the plaintiff had put down in his list things which were not there at all. In making out his claim, he had entered the catalogue prices of new articles to replace those which he had lost, and though that might result in a claim for much more than the articles lost were actually worth, that could not be called fraudulent. The prices were put forward as a bargaining figure."

ELLIOTT *v.* ROYAL EXCHANGE ASSURANCE (1867), L.R. 2 EX. 237

Martin, B.: "If on the construction of the contract the parties appear to agree that before a court of law interferes with the matter, it shall be investigated by another tribunal, in such a manner that the decision of that tribunal is necessarily involved in the matter which the court of law is to adjudicate upon, that stipulation is lawful and must be complied with. But if the contract is merely that if a dispute arises, it shall be referred to arbitration, without any such provision as I have referred to, it is otherwise, and probably, if the stipulation was accompanied by a declaration that no action should be brought, it would be none the more invalid and ineffectual."

Bramwell, B.: "If two persons, whether in the same or in a different deed from that which creates the liability, agree to refer the matter upon which the liability arises to arbitration, that agreement does not take

away the right of action. But if the original agreement is *not simply to pay a sum of money, but that a sum of money shall be paid if something else happens, and that something else is that a third person shall settle the amount,* then no cause of action arises until the third person has so assessed the sum. For to say the contrary would be to give to the party a different measure or rate of compensation from that for which he has bargained."

FARR *v.* MOTOR TRADERS' MUTUAL INSURANCE SOCIETY, LIMITED, [1920] 3 K.B. 669

The plaintiff was the owner of two taxi-cabs which he insured with the defendants in February, 1918, for one year against damage caused to either of them by accidental external means. In the proposal for the policy the plaintiff, in answer to a question, stated that each cab was to be driven in one shift per 24 hours. At the foot of the proposal form the plaintiff stated that the above statement was true, and the policy provided that the statements in the proposal were to be the basis of the contract and to be considered as incorporated therein. In August, 1918, while one of the cabs was undergoing repair, the other cab was driven in two shifts per 24 hours for a very short time, and from that time until the accident hereinafter mentioned happened the two cabs were driven in one shift only. In November, 1918, the cab which had been driven in two shifts in August was injured by an accident. It was at that time being driven in one shift only. In an action on the policy to recover in respect of the damage so caused, the defendants contended that the statement in the proposal that the cab was to be driven in one shift per 24 hours was a warranty, and upon breach thereof the insurance came to an end.

Held, that the statement was not a warranty, but was merely descriptive of the risk, indicating that the cab, whilst being driven in more than one shift per 24 hours, would cease to be covered by the policy, but would be covered whilst being driven in one shift; and that the defendants were liable.

FITTON *v.* ACCIDENTAL DEATH INSURANCE CO. (1864), 17 C.B. (N.S.) 122

Willes, J.: "It is extremely important with reference to insurance that there should be a tendency rather to hold for the assured than for the company where any ambiguity arises upon the face of the policy."

GALE *v.* MOTOR UNION INSURANCE COMPANY, LTD.; LOYST *v.* GENERAL ACCIDENT ASSURANCE CORPORATION, LTD. (1926), 43 T.L.R. 15

Gale took out with the M. Company a motor car insurance policy covering himself and any friend driving with Gale's consent, and providing that "the extension of the indemnity to friends or relatives of the insured is conditional upon such friend or relative being a licensed and competent driver and not being insured under any other policy."

Loyst, who was Gale's brother-in-law, took out with the G. Company a similar policy providing that "the insured will also be indemnified hereunder whilst personally driving a car not belonging to him, provided . . . that there is no other insurance in respect of such other car whereby the insured may be indemnified."

Each policy contained the usual *pro rata* contribution condition.

While Loyst was driving Gale's car with Gale's consent, it had a collision, and Loyst had to pay damages. Gale, as trustee for Loyst, claimed against

the M. Company, and Loyst on his own behalf claimed against the G. Company.

Held, that in each policy the provision as to rateable contribution qualified the preceding clause, and each company was liable to pay the claimants half the amount claimed.

Roche, J.: "As to the proportions in which the contributions should be calculated, he did not think that the suggested contribution of each company according to the value of the particular car which it had insured was satisfactory. The right basis was that each of the respondents should pay the claimants one-half of the amount claimed, and he therefore ordered accordingly."

GENERAL ACCIDENT INSURANCE CORPORATION *v.* CRONK (1901), 17 T.L.R. 233

The defendant filled up a proposal form for a policy of insurance against claims in respect of drivers' accidents. The proposal form provided that if the risk was accepted the defendant would pay the premium when called upon to do so. The risk was accepted by the insurance company, and a policy was issued. The policy contained some terms which did not appear in the proposal.

Held, that the defendant was liable to pay the amount of the premium.

Wills, J.: "The defendant in his proposal undertook, if the risk was accepted by the plaintiffs, to pay the premium. That meant that as soon as the risk was accepted he became liable to pay the premium, and it did not mean, what was contended on his behalf, that before he could be asked for the premium he must approve of the policy tendered to him. He must be taken to have applied for the ordinary form of policy issued by the company. If the wrong form of policy was tendered to him he, no doubt, had the right to insist on receiving the correct one. But the fact that the wrong form of policy was tendered to him did not relieve him from the obligation to accept the policy for which he did apply or from the obligation to pay the premium."

GOLDING *v.* LONDON & EDINBURGH INSURANCE CO., LTD. 43 Ll.L.Rep. 487

In 1930, Golding was involved in a motor accident. The company refused to meet a claim on the grounds that there had been misstatements in the proposal. Judgment for £400 was given against Golding in connection with the accident, and he thereupon issued proceedings to recover that sum from his insurers, submitting that there had been a complete repudiation of his policy. The company sought to stay the action under Section 4 of the Arbitration Act, 1889. The policy contained a clause making an arbitration award a condition precedent to liability.

In the Court of Appeal it was held that the action should be stayed. L.J. Scrutton said that as soon as his case was opened the plaintiff would be asked where his arbitration award was, and he would have to say he had not got one and that somehow or other he was really making his claim not on the policy stated, but on that policy with some conditions left out.

GRIFFITHS *v.* FLEMING, [1909] 1 K.B. 805

Farwell, L.J.: "The proposals have been put in and used by both sides, and although they could not be used in an action on the policy in order to construe the policy, they could, of course, be used in an action to rectify."

GROVER & GROVER, LIMITED *v.* MATHEWS, [1910] 2 K.B. 401

The plaintiffs were the owners of a freehold factory at New Southgate, where they carried on the business of pianoforte manufacturers. In March, 1908, the plaintiffs by their agent B took out a Lloyd's policy for £1,000 on the factory for twelve months from 26th March, 1908, to 25th March, 1909, inclusive. This policy was effected by B through D, an insurance broker at Lloyd's. On 4th March, 1909, without any instructions from the plaintiffs, B wrote to D, heading his letter, "Fire Insurance, Messrs. Grover & Grover, £1,000," and saying, "I am not sure that it is customary to send renewal notices in the case of insurances at Lloyd's and shall be glad to hear from you as to this. The present insurance expires on the 25th inst." Thereupon, on 5th March, D caused a slip to be prepared upon which the present action was brought. The slip was initialed by S, who was the defendant's underwriting representative at Lloyd's, and the defendant admitted that if there was a contract of insurance the initialing of the slip by S bound him (the defendant) to the extent of £50, the amount insured by him. On 27th March, 1909, the plaintiffs' factory was destroyed by fire. Later in the day two directors of the plaintiff company saw B and handed him cheque for the premium for a further year; B the same day forwarded the cheque to D, saying, "Enclosed please find cheque in payment of premium for current year from 25th inst." D declined to accept the cheque for the premium, as it was sent after the loss had occurred.

A question to be decided, amongst others, was whether, assuming that a valid contract of fire insurance had been made through B with the defendant by D on behalf of the plaintiffs, but without their authority, the plaintiffs could ratify it after the loss occurred.

Held, that the principal could not ratify the contract after the loss was known to him.

Hamilton, J.: "As it appears to me, the Court of Appeal in *Williams* v. *North China Insurance Co.* recognized that a rule which would permit a principal to ratify an insurance even after the loss was known to him was an anomalous rule which it was not, for business reasons, desirable to extend, and which, according to the authorities, had existed only in connection with marine insurance. No case has been cited to me which suggests that this anomalous rule ought to be extended to fire insurance."

GUARDIAN ASSURANCE COMPANY, LIMITED *v.* SUTHERLAND AND ANOTHER (1939), 55 T.L.R. 577

In this action the plaintiffs claimed declarations under Section 10 of the Road Traffic Act, 1934, avoiding a policy of insurance on a motor car

Sutherland had a motor-car insurance with the plaintiffs, and it was admitted in the proceedings that the policy had been obtained by misrepresentations and concealment of material facts. The insurance was transferred from one car to another at various times, and eventually to a Mercedes, of which Sutherland represented he was the owner. The other defendant was one Sidebotham, who whilst driving the Mercedes on 20th June, 1938, collided with a motor cycle and sidecar combination, and injured the occupants.

It is provided by Section 36 (4) of the Road Traffic Act, 1930, that: "Notwithstanding anything in any enactment, a person issuing a policy of insurance under this section shall be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons."

It was held by the Court that the policy issued under that subsection

was, by virtue of Section 36 (1) (*b*), a policy which "insures such person or persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle upon a road." But a policy obtained by a misrepresentation of material facts insured no one, and as such a policy could not therefore be a policy as defined by Section 36 (1) (*b*), subsection (4) of Section 36 did not apply to a policy so obtained. That subsection did not impose any statutory liability on the insurer, but only gave to the persons specified a statutory right to sue on the contract contained in the policy, which right, apart from the statute, they did not possess.

Hambro *v.* Burnand and Others, [1904] 2 K.B. 10

Where an agent, in contracting on behalf of his principal, has acted within the terms of a written authority given to him by the principal, but the existence of which was not known to the other party to the contract, the principal cannot, if the other party has acted *bona fide*, repudiate liability on the contract on the ground that the agent, in making it, acted in his own interests, and not in those of his principal.

Burnand, an underwriter at Lloyd's, had written authority from the other four defendants to act as their agent in underwriting policies of insurance. Messrs. Hambro, bankers, had an arrangement with a company called Henry Gaze & Sons, to finance the latter. Hambro's accepted the drafts of Gaze & Sons, which the latter discounted, and by way of security furnished policies issued by Burnand guaranteeing payment of the drafts at maturity should Gaze & Sons fail to meet them. Burnand issued these policies in the names of himself and his co-defendants. Burnand became a director of Gaze & Sons, and was personally engaged in financial dealings with that company. Burnand never entered these policies in his business books or introduced them into any of the accounts which he rendered to the other defendants; no premiums had been paid by Gaze & Sons thereon. The evidence showed that Burnand, desiring to keep the company of Gaze & Sons afloat, was, in underwriting the policies, acting for himself and in furtherance of his own interests, and not for or in the interests of the other defendants.

Romer, L.J.: . . . "If the agent, in underwriting a policy in the principal's name, acted within the scope of that written authority, it appears to me on principle that, as regards a person taking in good faith and for valuable consideration the policy so underwritten, it is binding on the principal, who cannot escape from liability merely because the agent may have abused the authority or betrayed his trust. . . ."

See also *Lloyd* v. *Grace, Smith & Co.*

Heyman and Another *v.* Darwins, Limited (1942), 58 T.L.R. 169

By a written contract in 1938 the defendants, steel manufacturers in Sheffield, appointed the plaintiffs, a firm in New York, to be sole selling agents of their tool steels in a wide area abroad. The contract contained a clause that "any dispute arising between the parties in respect of the agreement or any of its provisions or anything arising thereout" should be referred to arbitration in accordance with the Arbitration Act, 1889, or any then subsisting statutory modification thereof.

A dispute arose on a complaint, rightfully or wrongfully, by defendants that steels were being sold for purposes for which the purchasers found

they were not suitable, and that in consequence the risk arose of having to face claims from dissatisfied buyers. The defendants desired to withhold part of the remittances due to the plaintiffs as security against such claims, and intimated that further orders could only be accepted on this understanding. They eventually suggested either cancelling the agreement altogether or negotiating with a view to drawing up a more satisfactory arrangement. The plaintiffs alleged that by their attitude the defendants had "repudiated and/or evinced an intention not to perform" the agreement. Proceedings were issued for the Court to make a declaration to this effect and for damages. The defendants applied to have the action stayed pursuant to Section 4 of the Arbitration Act, 1889, in order that the matters in dispute might be dealt with under the arbitration clause. In the exercise of his discretion, the Judge in Chambers refused to grant a stay. On appeal to the Court of Appeal and House of Lords, it was decided and upheld that the arbitration clause clearly applied to the dispute, and that the Judge had made a wrong use of his discretion in refusing to grant a stay. The governing consideration in each case must be the precise terms of the language in which the arbitration clause is framed.

HORNE *v.* POLAND, [1922] 2 K.B. 364

The plaintiff, an alien born in Rumania, was brought to this country when 12 years of age. He assumed an English name, but was never naturalized, and had registered as an alien under the War legislation. He failed to communicate any of the above facts to the defendants, with whom he effected a policy against burglary twenty-two years after arriving in this country.

Held, that the non-disclosure of the fact that the assured is an alien does not necessarily invalidate such a policy: that it depends on the circumstances of the particular case, and that in the circumstances of this case the fact was material, and that therefore its non-disclosure avoided the policy.

Lush, J.: "In order to avoid ridicule owing to his foreign name, Euda Gedale, he (the plaintiff) took the name of Harry Horne. . . . The plaintiff was apprenticed in the name of Horne and has since carried on business in that name, but was married under his real name, Euda Gedale. . . . I cannot agree with the view . . .that the mere fact that a person is a foreigner and not a British subject is in all cases a material fact, so that the non-disclosure of it invalidates the policy. . . . Each case must depend on its circumstances. The circumstances here are that the plaintiff came from Eastern Europe, he and his parents being subjects of a State of whose habits and traditions the underwriters would naturally know nothing; and he had lived in his own country until he was 12 years of age. These facts were clearly material. . . . If a reasonable person would know that underwriters would naturally be influenced in deciding whether to accept the risk and what premiums to charge by those circumstances, the fact that they were kept in ignorance of them and, indeed, were misled is fatal to the plaintiff's claim."

HYDARNES STEAMSHIP CO. *v.* INDEMNITY MUTUAL MARINE
[1895] 1 Q.B. 500

Rigby, L.J.: "I agree that, where there are general words in a contract which may have an application to a state of things existing under the

contract, the Court ought to be very cautious in rejecting them, even though they are in common form, in the absence of very strong reasons for doing so."

ISITT AND OTHERS, EXECUTORS *v.* THE RAILWAY PASSENGERS' ASSURANCE COMPANY (1889), 22 Q.B.D. 504

The assured under a policy granted by the defendant company against "death from the effects of injury caused by accident," fell and dislocated his shoulder. He was at once put to bed and died in less than a month from the date of the accident, having been all the time confined to his bedroom. In a case stated in a reference under the defendants' special Act, the umpire found that the assured died from pneumonia caused by cold, but that he would not have died as and when he did had it not been for the accident, that as a consequence of the accident he suffered from pain and was rendered restless, unable to wear his clothing, weak, and unusually susceptible to cold, and that his catching cold and the fatal effects of the cold were both due to the condition of health to which he had been reduced by the accident.

Held, that the death of the assured was due to the "effects of injury caused by accident" within the meaning of the policy.

Wills, J.: ". . . These facts appear to me to present the exact negative of the case suggested of a person who having been weakened in a railway accident is then run over in the street by an omnibus. In that case the fatal injury caused by the omnibus is something altogether foreign to and independent of the railway accident, whereas here the facts show that the death of the assured was due, not to any foreign or independent cause, but to the natural consequences of the injury."

JOEL *v.* LAW UNION AND CROWN INSURANCE COMPANY [1908] 2 K.B. 863

One R. M. effected with the defendants an insurance upon her own life in pursuance of a proposal in which she made certain statements, the truth of which was not disputed. She signed a declaration that the statements so made were to the best of her knowledge and belief true, and by which she agreed that "this proposal and declaration" should be "the basis of the contract" between her and the defendants. Subsequently to the proposal, but before the execution of the policy, certain questions contained in a printed form were put to her by a doctor, who was instructed by the defendants to put these questions with any necessary explanation and fill in her answers thereto, and to report upon her health, and these questions were answered by her. She signed a second declaration, contained in the before-mentioned form, wherein she declared, "with reference to the proposal for assurance" on her life and her previous declaration, that the answers to the foregoing questions were all true. This declaration did not state that the answers were to form part of the basis of the contract. The policy did not refer to the proposal or either of the declarations. The assured subsequently committed suicide.

An action having been brought on the policy by the executrix of the assured, the defendants resisted the plaintiff's claim upon the ground that the accuracy of the answers to the above-mentioned questions was made a condition precedent to the validity of the policy, and upon the ground of misstatement and non-disclosure of material facts by the assured.

Held, on appeal, that, although the terms of the first declaration signed by the assured did not exclude the possibility of the truth of her answers

to the questions referred to in the second declaration being material to the validity of the policy, yet, having regard to the nature and purposes of those questions, the truth of the answers to them was not, on the true construction of the documents, made part of the basis of the contract.

Held, further, that under the circumstances of the case, without the evidence of the doctor who put the questions to the assured as to what took place when he put the questions to her, and what explanation of them he gave to her, the second declaration signed by the assured as above mentioned was not *per se* sufficient evidence to prove that there had been any such non-disclosure of material facts by the assured as would, in the absence of fraud, render the policy voidable.

(In the lower court the jury found that the assured foolishly, but not fraudulently, concealed the fact that she had consulted Dr. K. M. for nervous depression.)

JOYCE *v.* REALM INSURANCE CO. (1872), L.R. 7 Q.B. 580

Blackburn, J.: "That part that is specially put into a particular instrument is naturally more in harmony with what the parties are intending than the others, though it must not be used to reject the other, or to make it of no effect."

JUREIDINI *v.* NATIONAL BRITISH AND IRISH MILLERS' INSURANCE COMPANY, LIMITED, [1915] A.C. 499

A claim was made for indemnity for the loss of goods by fire under a policy the conditions of which provided (1) that if the claim were fraudulent, or if the loss were occasioned by the wilful act or with the connivance of the insured, all benefit under the policy should be forfeited; and (2) that if any difference arose as to the *amount of any loss* such difference should, independently of all other questions, be referred to arbitration, and that it should be a condition precedent to any right of action upon the policy that the award of the arbitrator or umpire of the amount of the loss if disputed should be first obtained. The insurance company repudiated the claim *in toto* on the ground of fraud and arson—

Held, that the repudiation of the claim on a ground going to the root of the contract precluded the company from pleading the arbitration clause as a bar to an action to enforce the claim.

But see *Scott* v. *Avery; Woodall* v. *Pearl Assurance Co., Ltd.*

LAW ACCIDENT INSURANCE SOCIETY *v.* BOYD AND ANOTHER (1942), *Scots Law Times* 207

Proceedings were successfully brought by the "Law Accident" against Boyd under Section 10 (3) of the Road Traffic Act, 1934, for a declaration that they were entitled to avoid a motor policy as from date of last renewal in February, 1940, owing to non-disclosure of a material fact. The policy was issued in 1935, and had been renewed year by year since. An accident occurred in November, 1940, causing serious third party injury. Boyd pleaded guilty to driving "under the influence" at the time. In July, 1939, he had been convicted on a similar charge, and had not informed his insurers when next renewing his policy. On appeal, the declaration was upheld.

The motor policy covered accidents "during the period of insurance stated in the Schedule or during any period for which the Society may accept payment for the renewal of this policy." It was argued for the defence that the policy was a continuing contract which, although it

contemplated periodic renewals, remained in force until it had been expressly terminated by either party. It was held by the Court that the policy did not fall into the very special category of contract under which the insurance persists indefinitely without the necessity for periodic renewal and without reference to the wishes of the parties. A new contract of insurance is entered into on each renewal, and on every renewal there arises an obligation on the insured to make such disclosure as may be necessary and proper, and to correct any statements in his original proposal which may no longer be accurate and which may be material to the risk for which he seeks cover during the year still to come.

LAWRENCE *v.* ACCIDENTAL INSURANCE CO.
(1881), 7 Q.B.D. 216

Watkin-Williams, J.: "It seems to me that the well-known maxim of Lord Bacon, which is applicable to all departments of the law, is directly applicable to this case. Lord Bacon's language in the *Maxims of the Law*, Reg. 1, runs thus: 'It were infinite for the law to consider the cause of causes, and there impulsions one of another, therefore it contenteth itself with the immediate cause.' Therefore, I say, according to the true principle of law, we must look at only the immediate and proximate cause of death, and it seems to me impracticable to go back ultimately to the birth of the person, for if he had never been born the accident would not have happened."

LEVY *v.* ASSICURAZIONI GENERALI (1940), 56 T.L.R. 851

A condition in a fire policy issued in November, 1936, to an insured in Palestine in respect of stock in a warehouse in Jaffa was expressed to exclude earthquake, war, civil commotion and kindred perils, and provided that—

"Any loss or damage happening during the existence of abnormal conditions, whether physical or otherwise, directly or indirectly, proximately or remotely, occasioned by or contributed to by or arising out of or in connection with any of the said occurrences, shall be deemed to be loss or damage which is not covered by this insurance, except to the extent that the insured shall prove that such loss or damage happened independently of the existence of such abnormal conditions.

"In any action, suit or other proceeding, where the company alleges that by reason of the provisions of this condition any loss or damage is not covered by this insurance, the burden of proving that such loss or damage is covered shall be upon the insured."

In December, 1936, a fire occurred in the warehouse and the stock was damaged. In proceedings which eventually reached the Judicial Committee of the Privy Council, the issue was (1) as to the true construction of the condition and (2) whether on the admitted or proved facts the loss was covered by the policy. On the first point it was held that as a matter of agreement between parties the onus of proof of any particular fact, or of its non-existence, may be placed on either party in accordance with the agreement made between them.

LEWIS *v.* RUCKER (1761), 2 Burr. 1167

Lord Mansfield: "A valued policy is not to be considered as a wager policy or like 'interest or no interest.' . . . The only effect of the valuation is fixing the amount of the prime cost; just as if the parties admitted

it at the trial; but in every agreement, and for every other purpose, it must be taken that the value was fixed in such a manner as that the assured meant only to have an indemnity."

LLOYD *v.* GRACE, SMITH & CO., [1912] A.C. 716

A widow, who owned two cottages and a sum of money secured on a mortgage, being dissatisfied with the income derived therefrom, consulted a firm of solicitors and saw their managing clerk, who conducted the conveyancing business of the firm without supervision. Acting as the representative of the firm, he induced her to give him instructions to sell the cottages and to call in the mortgage money, and for that purpose to give him her deeds (for which he gave a receipt in the firm's name); and also to sign two documents, which were neither read over nor explained to her, and which she believed she had to sign in order to effect the sale of the cottages. These documents were, in fact, a conveyance to him of the cottages and a transfer to him of the mortgage. He then dishonestly disposed of the property for his own benefit.

Held, that the firm were responsible for the fraud committed by their representative in the course of his employment.

A principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent.

See also *Hambro* v. *Burnand and Others*.

LONDON ASSURANCE *v.* MANSEL (1879), 11 Ch.D. 363

In a proposal by M to an assurance office for an assurance on his life, in answer to the question, "Has a proposal ever been made on your life at any other office or offices? If so, where? Was it accepted at the ordinary premium, or at an increased premium, or declined?" his answer was, "Insured now in two offices for £16,000 at ordinary rates. Policies effected last year." The proposal was accepted, but the office having subsequently ascertained that the life of M had been declined by several offices—

Held, that there had been a material concealment, and that the office was entitled to have the contract set aside.

(At the foot of the proposal the defendant signed the following declaration: "I declare that the above written particulars are true, and I agree that this proposal and declaration shall be the basis of the contract between me and the London Assurance.")

Jessel, M.R.: ". . . I am not prepared to lay down the law as making any difference in substance between one contract of assurance and another. Whether it is life, or fire, or marine assurance, I take it good faith is required in all cases. . . ."

LONDON GUARANTIE COMPANY *v.* FEARNLEY (1880), 5 A.C. 911

F, who was about to employ M in a situation of trust and confidence, effected a policy with a Guarantie Company to secure himself against fraud by embezzlement of money by M. The policy, which was for £1,000, was expressed to be "subject to the conditions contained herein, which shall be conditions precedent to the right on the part of the employer to recover under this policy." The employer was to give notice of the claim, and proofs were to be given such as the directors might require. Then followed this proviso: "Provided that the employer shall if, and when,

required by the company (but at the expense of the company, if a conviction be obtained), use all diligence in prosecuting the employed to conviction for any fraud or dishonesty (as aforesaid) in consequence of which a claim shall have been made under this policy. . . ." F claimed under this policy a sum of money alleged to have been lost by M's embezzlement. The directors pleaded that they had required F to prosecute M, but that F had not done so.

Held, reversing the judgment of the Court below, that the proviso constituted a condition precedent, and furnished a defence to the action.

Lord Watson: "When the parties to a contract of insurance choose in express terms to declare that a certain condition of the policy shall be a condition precedent, that stipulation ought, in my opinion, to receive effect, unless it shall appear either to be so capricious and unreasonable that a Court of Law ought not to enforce it, or to be *suâ natura* incapable of being made a condition precedent."

But see *In re Bradley and Essex & Suffolk Accident Indemnity Society*

LUCENA *v.* CRAUFURD (1806), 2 Bos. & P. (N.R.) 269

Lawrence, J.: "A man is interested in a thing to whom advantage may arise or prejudice happen from the circumstances which may attend it . . . and whom it importeth that its condition as to safety or other quality should continue; interest does not necessarily imply a right to the whole or part of a thing, nor necessarily and exclusively that which may be the subject of privation, but in having some relation to, or concern in the subject of the insurance, which relation or concern by the happening of the perils insured against may be so affected as to produce damage, detriment, or prejudice to the person insuring; and where a man is so circumstanced with respect to matters exposed to certain risks or damages, as to have a moral certainty of advantage or benefit, but for those risks or dangers, he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing, is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction. The property of a thing, and the interest devisable from it, may be very different; of the first the price is generally the measure, but by interest in a thing every benefit or advantage arising out of, or depending on, such things may be considered as being comprehended."

MCELROY *v.* LONDON ASSURANCE CORPORATION (1897), 24 R. (Ct. of Sess.) 287

Lord Maclaren: "If the insurance company delivers a policy without requiring immediate payment of the premium, they incur responsibility for the risk, because, having delivered the policy, they are held to have given credit for the premium.

"If they accept a premium before delivering a policy, I should be disposed to hold that the acceptance of the premium and the delivery of the receipt therefor was sufficient to create the obligation to deliver a policy."

MARSDEN *v.* THE CITY AND COUNTY ASSURANCE COMPANY, LIMITED (1866), 13 L.T. 465

The plaintiff's plate-glass shop front was insured by the defendants "from loss or damage *originating* from any cause whatever except fire, breakage during removal, alteration, or repair of premises." On a fire breaking out in a neighbouring house, about 25 yards distant from the

insured shop front, plaintiff, fearing it might extend to his shop (it had caught a portion of the back part of his premises), opened his shop door, and with the assistance of his neighbours began to remove his goods from the shop, and whilst so engaged the crowd in the street tore down his shop shutters, broke the plate-glass front, and stole some of his goods.

Held, that this was not a "loss or damage *originating* from fire or breakage during removal" within the meaning of the exception in the policy, and that plaintiff was therefore entitled, in an action on the policy, to recover from the defendants the amount of damage done by the crowd to his plate-glass front on the occasion in question.

Erle, C. J.: "The remote cause of the damage may be said to have been the fire, but the proximate cause of it was the violence of the persons outside the plaintiff's premises during the progress of the fire."

By one of the conditions of the policy, notice of any loss or damage was to be given within ten days "to the manager, or to some known agent of the company." L was their agent, who negotiated the policy, and received the premium, but on defendants subsequently transferring their business to another company, he ceased to be their agent. Plaintiff, who had no notice that L had ceased to be defendant's agent, gave notice of the loss, and sent in his claim for compensation to L the day after the damage was done, and L transmitted it to the secretary of the new company.

Held, that, in the absence of notice to plaintiff of the change of agency, his notice and claim so given and sent to L were good, and sufficiently complied with the condition in the policy.

MAURICE *v.* GOLDSBOROUGH MORT & CO., LTD.
(1939), 55 T.L.R. 714

The respondents, wool brokers, who held in their store for the purpose of sale on a commission basis, wool belonging to the appellant, had insured it in their own name and as property "held by them in trust or on commission for which they may be liable in the event of loss" against loss or damage by fire under policies which provided, *inter alia*, that a claim thereunder should state the amount of the loss or damage "not including profit of any kind." The wool having been destroyed by fire,

Held, by the Judicial Committee of the Privy Council, that the respondents did not insure as agents for the appellant, but on account of their own insurable interest which arose from their potential liability to the appellant, and they were entitled to recover in full from the insurer for the insured value of the wool. The policy, however, insured the wool as the subject-matter of the insurance, and did not cover profits which the respondents might have earned but for the loss. In an apportionment, therefore, between the respondents and the appellant according to their respective interests, the former were not entitled to deduct from the insurance money payable to the appellant, commission which they would have earned and charges which they would have been entitled to make for receiving, weighing, lotting, valuing, etc., if the wool had not been destroyed by fire.

MEACOCK AND ANOTHER *v.* BRYANT AND COMPANY
(1942), 59 T.L.R. 51

The plaintiffs issued policies to the defendants by which they undertook to pay a loss in the event of certain sums, "deposited by a bank or banks in Spain on behalf of the insured with the Centro in Spain," not being

received by the insured within fifteen months from the date of such deposit. The sums covered by the policies were not received by the defendants within fifteen months from the date of deposit, and the defendants claimed from the plaintiffs the amounts for which they had undertaken liability under the policy, and those sums were paid in full.

Subsequently the defendants received part of the sums due to them in Spain, and the plaintiffs claimed to be entitled by subrogation to the amount so received. The defendants refused to pay the amount claimed on the ground that the contracts of insurance contained in the policies were not indemnities, but were merely contracts to pay on the happening of a certain event, and that no right to subrogation could arise.

Held, that the contracts of insurance were by their nature indemnities, and that the plaintiffs were entitled by subrogation to the money claimed.

MERCHANTS' AND MANUFACTURERS' INSURANCE COMPANY, LIMITED *v.* HUNT AND OTHERS
(1940), 57 T.L.R. 208

By a policy of motor insurance dated 1st September, 1938, which made the declaration and proposal of the insured for the policy "the basis of the contract," the respondent was insured for one year against, *inter alia*, third party liability. On 8th October, 1938, while the insured car was being driven by the insured's son, two third parties were injured. Subsequently, the insured and his son both made to representatives of the appellants, the insurers, statements regarding the falsity of two answers to questions made by the insured in the proposal. The third parties having issued a writ against the insured claiming damages for personal injuries, the insurers began an action under Section 10 (3) of the Road Traffic Act, 1934, for a declaration that they were entitled to avoid the policy on the ground that it had been obtained by false representations or non-disclosure of material facts, and they gave the third parties notice of the grounds of their claim as required by the proviso to the subsection. In due course, the third parties were added as defendants in the action. At the trial of the insurers' action, neither the insured nor his son gave evidence, but evidence by the representatives of the insurers of the admissions made by the insured and his son was admitted as evidence against the third parties.

Held, by the Court of Appeal, that the effect of the proviso to subsection (3) of Section 10 was that a third party was entitled to be made a party to an action by insurers under the subsection with all the rights of a party to an action, including the right of a defendant to insist that the case against him should be properly proved, and that, in the present case, as the case against the third parties had not been so proved, they were entitled to judgment.

Where there has been misrepresentation of a material fact, the right to avoid a contract, whether of insurance or not, does not depend on any implied term of the contract, but arises by reason of the jurisdiction originally exercised by the courts of equity to prevent imposition.

The warranty in the declaration and the provisions in the policy that the truth of the answers to the material questions in the proposal was a condition precedent to the insurers' liability constituted a warranty which conferred a contractual right on the insurers, and had no reference to the right to set aside the policy, whether for false representation or for non-disclosure.

Per Scott, L.J.: "An answer in merely the affirmative or the negative made by the proposer for an insurance policy, in answer to a question in

the proposal form, must be interpreted as representing not merely that he was speaking to the best of his knowledge and belief, but that he knew the fact or facts to be as stated."

MURFITT *v.* ROYAL INSURANCE CO., LTD. (1922), 38 T.L.R. 334

The plaintiff, who owned an orchard and a garden alongside a railway, submitted to a subordinate local agent of the defendants, who were an insurance company, a proposal for insuring his trees and fruit against fire. The agent said that the plaintiff would be held covered, pending the defendants' decision whether they would accept the proposal. Then a fire occurred, and after the fire, but before the defendants knew of it, they refused to accept the risk. The agent had no express authority from the defendants to make the bargain with the plaintiff. In an action on the oral contract made by the defendants' agent—

Held, that *on the facts* (see below) the defendants' agent had implied authority to make the contract, and the plaintiff was in the circumstances entitled to recover.

McCardie, J.: "There was nothing in English law to prevent the formation of an oral contract of insurance as to fire or burglary, although the position as to marine insurance was different owing to statutory requirements. . . . The first question in the case was: Had Allwood express authority from his employers to make this bargain? Plainly he had not. Allwood was not a salaried official, but he was a full agent, which was something more than a casual agent; and he had neither written nor oral authority to make contracts of insurance. . . . There had been two previous insurances which the plaintiff had effected through Allwood, but they both related to motor bicycles, and were insurances of a quite different kind. . . . There was a third question: Must Allwood be held to have had an implied authority? . . . On the whole of the facts he thought that the plaintiff was right in saying that Allwood had an implied authority In the voluminous correspondence between the officials of the company there was no suggestion that Allwood had acted without authority, and the evidence showed that it was really impossible to carry on the business of fire insurance without giving oral cover. Allwood occupied a position in which he might well have been authorized to give oral cover, and he had been *habitually giving it for two years before, to the knowledge of his superiors and with their consent.* On this ground, therefore, *on the special facts of the case,* judgment must be for the plaintiff."

NEWSHOLME BROTHERS *v.* ROAD TRANSPORT & GENERAL INSURANCE CO., LTD. (1929), 45 T.L.R. 573

The insurance company supplied accident proposal forms to their agent, and the true answers to the questions thereon were given to him orally by a partner in the claimant firm. The agent thereupon wrote on the form answers to the questions, but the answers so written by him were not correct. The said partner then signed the form, and the company issued to the claimant firm a policy incorporating the written proposal and accepted the premium. On the occurrence of an accident, the company repudiated the policy on the ground that the written answers were untrue.

Held, that as the contract was that the written answers should be the basis of the insurance, the company were not liable on the policy.

Biggar v. *Rock Life Assurance Company* followed.

Bawden v. *The London, Edinburgh & GlasgowAssurance Co.* distinguished,

Scrutton, L.J.: "In my view the decision in *Bawden's case* is not applicable to a case where the agent himself at the request of the proposer fills up the answers in purported conformity with information supplied by the proposer. If the answers are untrue and he knows it, he is committing a fraud which prevents his knowledge being the knowledge of the insurance company. If the answers are untrue, but he does not know it, I do not understand how he has any knowledge which can be imputed to the insurance company. In any case, I have great difficulty in understanding how a man who has signed, without reading it, a document which he knows to be a proposal for insurance, and which contains statements in fact untrue, and a promise that they are true and are the basis of the contract, can escape from the consequences of his negligence by saying that the person whom he asked to fill it up for him is the agent of the person to whom the proposal is addressed."

NOBEL'S EXPLOSIVE CO. *v.* BRITISH DOMINIONS INSURANCE CO. W.C. and Ins. Rep. 106

Lord Guthrie: "Outside the region of mathematics, proof is never anything more than probability. It is for the Court in each case to say whether the probability is so slight, or so equally balanced by counter-probabilities, that nothing more results than a surmise; or whether the probabilities are so strong and so one-sided as to amount to legal proof. The abstract possibility of mistake can never be excluded."

NORTH BRITISH AND MERCANTILE INSURANCE COMPANY *v.* LIVERPOOL, AND LONDON, AND GLOBE INSURANCE COMPANY (1877), 5 Ch. 569

By floating policies of insurance, B & Co., wharfingers, insured against loss or damage by fire, in the sums named, grain and seed, the assured's own or on commission, for which they were responsible, subject to conditions of average, and to the usual *pro rata* contribution condition. While these policies were subsisting, a fire destroyed a quantity of grain stored with B & Co., part of which belonged to R & Co., who had also effected policies, called merchants' policies, on the grain thus destroyed, including also grain stored elsewhere, which policies contained the like conditions as the wharfingers' policies. B & Co. were paid in full by the several insurance companies. In a suit to determine the liability of the companies *inter se*—

Held, that the grantors of the merchants' policies were not liable to contribute to the loss; that B & Co. were primarily liable, but, being indemnified by the grantors of the wharfingers' policies, the latter were ultimately liable.

Held, also, that the condition as to double insurance only applied to cases where the same property was the subject-matter of insurance and where the interests were the same.

IN RE PHOENIX LIFE ASSURANCE CO., BURGESS & STOCK (1862), 2 J. & H. 441

At a specially convened meeting of a company established for granting insurances on lives, it was resolved to extend the business to marine insurances. The resolutions were afterwards confirmed; a deed embodying them was executed by some, but not all, of the shareholders; and in the annual return to the Joint Stock Companies' Registry Office the business of the company was stated to include marine insurance. The reports of the

directors several times alluded to the extension of the business, and on one occasion a report alluding to such extension accompanied the dividend warrant. The business, as extended, was carried on for a year and a half, when the company was ordered to be wound up.

Held, that the general body of shareholders was not bound, by acquiescence, or otherwise, to the alteration of business involved in this extension, and, consequently, that holders of marine policies could not come in as creditors of the company in respect of losses under such policies.

PROSSER *v.* LANCASHIRE & YORKSHIRE INSURANCE COMPANY, LTD. (1890), 6 T.L.R. 285

On 5th June, 1884, the plaintiff, who was a grocer at Aberdare, effected a policy of insurance with the defendants against bodily injury. On 6th March, 1886, he met with an accident by straining his back in lifting a sack of flour, and was totally disabled from work for some days. On 23rd March he signed an agreement undertaking to accept the sum of £11 15s. 10d. in full discharge of his claim against the defendants in respect of the accident, and on 1st April he signed a receipt for the money in full discharge of his *claim.* Subsequently, in consequence of the injury, he became totally disabled for 26 weeks. He then brought this action to recover the sum of £144 12s., the balance of the sum due under the policy for such total disablement at the policy rate of £6 per week. The defendants relied on the agreement and receipt.

Held, that the plaintiff was entitled to recover the further compensation.

Lord Esher, M.R.: "The plaintiff was entitled to succeed on the true construction of the agreement. The agreement was to accept the money in satisfaction of the *claim*; that meant the *claim which had already been made,* and which related solely to the disablement from which he had already suffered. It had no reference to any claim for future or prospective disablement, because none such had been made."

RAYNER *v.* PRESTON (1881), 18 Ch.D. 1

A vendor contracted with a purchaser for the sale of a house which had been insured by the vendor against fire. The contract contained no reference to the insurance. After the date of the contract but before the time fixed for completion, the house was damaged by fire, and the vendor received a sum of money from the office.

Held, that the purchaser, who had completed his contract, was not entitled as against the vendor to the benefit of the insurance.

Cotton, L.J.: "The contract (for the sale of the house) passes all things belonging to the vendor appurtenant to or necessarily connected with the use and enjoyment of the property mentioned in the contract, but not, in my opinion, collateral contracts. . . . In my opinion, the contract of insurance is not of such a nature as to pass without apt words under a contract for sale of the thing insured."

SARGINSON BROS. *v.* KEITH MOULTON AND COMPANY
The Review (12/6/42)

The defendant insurance brokers had erroneously advised the plaintiffs that timber in stock could not be insured against war risks, not knowing that materials from which goods were going to be made for sale were insurable. The goods were destroyed in an air raid. The Court held that "if people in professional positions took upon themselves to give advice

on a matter directly connected with their profession, then they were responsible for seeing that they were equipped with such skill as to render it reasonably safe advice. Defendants had failed to take the steps which a reasonably prudent person would have taken before an answer could be given with reasonable safety. They were, therefore, liable for such consequences as flowed directly from what was their lack of care."

SAWYER AND ANOTHER *v.* WINDOW BRACE, LTD.
(1942), 59 T.L.R. 43

In this action, the plaintiffs, Mr. C. H. Sawyer and Mr. C. H. Vincent, sought to recover from the defendants, Window Brace, Limited, sums of £252 8s. and £47 5s. 2d., which the plaintiffs paid to them under a mistake of law. The plaintiffs admitted by their statement of claim that the payment made by them was a voluntary payment made under a mistake of law and, therefore, *prima facie* irrecoverable, but they alleged that the payment was made under a threat of legal proceedings, with the result that it ceased to be voluntary and could be recovered by action.

It was held by the Court that where money is paid voluntarily under a mistake of law, no action for its recovery can be maintained by the person making the payment, even if it were made in consequence of a threat of legal proceedings.

SCOTT *v.* AVERY (1855), 25 L.J. (Ex.) 308

A mutual assurance company inserted in all its policies a condition that, when a loss occurred, the suffering member should give in his claim and prove his loss before a committee of members appointed to settle the amount; that if a difference thereon arose between the committee and the suffering member, the matter should be referred to arbitration, and that no action should be brought except on the award of the arbitrators.

Held, that this condition was not illegal as ousting the jurisdiction of the Courts.

The Lord Chancellor: "There could be no principle or rule of law which prevented parties from agreeing that there should be no breach of the contract between them until after there had been a reference to arbitration, although there might be a rule preventing them settling by arbitration alone any breach of contract. . . . The committee and the suffering member might disagree as to the amount to be paid. If so, an arbitration was to settle that amount, and it was the amount thus settled, and no other, that was to be recovered. That was the meaning of the parties, and he thought they had stated it in clear terms. It had been argued that the matter to be settled by the arbitrator was not confined to the amount, and that, therefore, the covenant was bad. If not so confined, that would not affect his view of the case. Parties might agree that no right of action should arise between them until J. S. had determined whether the contract had been fulfilled, and what damages had been sustained by its breach, and, if they did so agree, no right of action would exist till J. S. had so decided."

But see *Jureidini* v. *National British & Irish Millers' Insurance Co., Ltd.* See also *Woodall* v. *Pearl Assurance Co., Ltd.*

SIMPSON *v.* ACCIDENTAL DEATH INSURANCE CO.
(1857), 2 C.B. (N.S.) 257

A, on the 22nd January, 1852, effected with a company an insurance against death or injury by accident, the premium on which was payable

on the 22nd of January in each year. By one of the conditions endorsed on the policy (the first), the premium was to be paid "within twenty-one days from the day on which the same should first accrue or become due," and "provided the same should be from time to time paid within such space of twenty-one days, the policy should not be void notwithstanding the happening before the expiration of such space of twenty-one days of the event or events, upon the happening whereof the amount secured by the policy should, according to the terms thereof, become payable." By another condition (the second), "if the premium should be unpaid for twenty-one days next after it should become due, the policy should be absolutely void, and the assured should forfeit all claim thereunder." And (by the fourth condition) "in every case when a new premium should become payable, the directors should be at liberty to terminate the risk, by refusing to accept such premium." A duly paid the premiums down to 1855. On the 27th January, 1856, an accident happened to him which caused his death on the 1st February following. On the 4th February the company had notice of his death, and a correspondence took place between their secretary and the attorney of A's executors respecting the cause of the death, and their claim on the policy, neither party at first knowing that the premium which became due on the 22nd January, 1856, was unpaid. On the 8th February the secretary for the first time became acquainted with the fact of the non-payment of the premium, but did not communicate it to the executors or their attorneys until the 13th (the day after the expiration of the twenty-one days allowed by the first condition for payment of the premium), when he informed the latter by letter that the directors had considered and rejected the claim.

Held, that there was nothing in the conditions to enable the *executors* to pay the premium after the insured's death, and that if they had tendered it within the twenty-one days, the company would not have been bound to accept it.

Held, also, that the policy expired on the 22nd January, 1856, and that neither the executors nor the insured (had he been living) had an *absolute* right to keep the policy alive by payment or tender of the premium within the twenty-one days after that date.

SMITH *v.* CORNHILL INSURANCE CO., LTD. (1938), 54 T.L.R. 869

The owner of a motor-car had taken out with an insurance company a policy which provided, *inter alia*, for payment of £1,000 to the insured or her estate in the event of her death, "provided that death occurs within six weeks from the date of the accident, and as the result solely of bodily injury caused by violent accidental external and visible means sustained by the insured whilst riding in . . . the insured car." While the insured was driving her car it left the road and fell down a ravine. The insured sustained a severe head injury, resulting in serious damage to the brain. While in a semi-consciousness arising from concussion, she left the car, wandered aimlessly through some brush-wood, and stepped into a stream. The shock of entering the water, which would, but for the injuries, have been insignificant, caused her to die from heart failure. The death was not due to drowning. The plaintiff, as administratrix of the deceased, having claimed from the insurance company, the defendants, £1,000 as due under the policy.

Held, that the death was the result solely of the injury caused by the accident within the meaning of the policy, and that the plaintiff was entitled to recover.

STEBBING *v.* LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, LIMITED, [1917] 2 K.B. 433

A policy of insurance contained a condition providing that if any false declaration should be made or used in support of a claim, all benefit under the policy should be forfeited. In answer to a claim by the assured, the insurers alleged that statements in the proposal and declaration were false.

Held, that the burden of proving that the statements were untrue lay upon the insurers.

Viscount Reading, C.J.: "The claimant was insured in a policy of insurance by the company against burglary. He claims to recover the value of property insured under his policy. The policy, which is the contract between the parties, recited that a 'proposal and declaration with certain written statements and particulars' are 'the basis of this contract.' In the proposal form there is a clause containing a declaration by the claimant that the answers in this proposal are full and true, that he has withheld no information whatever that might tend in any way to increase the company's risk or influence their decision regarding the policy, and that the proposal and declaration shall be the basis of the contract between the parties.

"By the terms of the policy, . . . the parties have agreed that the declaration with statements and particulars are the basis of the contract, and when the parties agreed to that it is no longer open to the claimant to deny the materiality of any one of those statements or its effect as an inducement to the company to enter into the contract.

"The proposal form contains a question . . . and his (the claimant's) answer is challenged by the company. The arbitrator is in doubt whether the answer to the question is true, and he asks the Court on whom is the burden of proof; whether on the claimant to prove that the answer is true, or on the company to prove that it is false. The burden of proof, in the first instance at all events, lies on that party against whom judgment should be given if no evidence were adduced on the issue . . . the burden lies on the company to prove that the claimant's answer is untrue."

SWALE *v.* IPSWICH TANNERY CO. (1906), 11 Com. Cas. 88

The plaintiff entered into an agreement with the defendants, a tannery company, to serve them as manager, and undertook to give his whole time and attention to the business. As part of his duty he was consulted by the defendants, and advised them as to the insurance of their premises. Without the defendants' knowledge he accepted an agency from an insurance company and received commissions from it in respect of insurances effected by the defendants through the plaintiff upon their premises with the insurance company. The agreement having expired, he subsequently entered into a fresh agreement with the defendants upon the same terms as to giving his whole time and attention to the business and advising the defendants as to the insurances upon their premises. At the expiration of this agreement he remained in the defendants' service without any fresh agreement being entered into. He continued during the whole time he acted as the defendants' manager, without the knowledge of the defendants, to act as agent for the insurance company and to receive commissions from it upon insurances effected through him upon the defendants' premises.

Held, that the acceptance by the plaintiff of the agency and the receipt by him of the secret commissions was misconduct which entitled the defendants to dismiss the plaintiff without notice, although under his contract of service he would otherwise have been entitled to six months' notice of the determination of his employment.

TATTERSALL *v.* DRYSDALE (1935), 51 T.L.R. 405

The plaintiff insured a motor car against third party and other risks with the "London and Edinburgh" under a policy which also provided (*inter alia*) indemnity to the insured whilst driving a car not belonging to him. The plaintiff sold this car to a firm of motor dealers, of which Gilling was a director, and ordered a new car. Pending delivery of the new car, the dealers agreed to lend Tattersall a Riley car, the property of Gilling and insured by him at Lloyd's under an "Eclipse" policy, the defendant being one of the underwriters. The "Eclipse" policy provided (*inter alia*) the usual extension to indemnify a person driving a car with the insured's permission, provided that such person was not entitled to indemnity under any other policy.

Gilling desired that plaintiff should arrange to insure the Riley car in his own name, but before this could be arranged, plaintiff was involved in a serious accident involving £2,150 damages. The action was brought by agreement between the respective insurers to determine on which insurer the loss was to fall.

The action also raised the important question whether by virtue of Section 36 (4) of the Road Traffic Act, 1930, a person driving with the insured's permission and covered by the policy, could himself sue on the policy though not a party to the contract of insurance.

Goddard, J.: "I turn to the question whether the plaintiff's policy was in force at the time of the accident . . . the policy insures the insured in respect of the ownership and use of a particular car . . . the clause I am considering is expressly stated to be an *extension* clause, that is, extending the benefits of the policy, and accordingly, if the insured ceases to be interested in the subject-matter of the insurance, the extension falls with the rest of the policy.

"The position, therefore, in my judgment, being that the plaintiff was driving the Riley with the permission of Gilling at the time of the accident, and that he was not entitled to indemnity under any other policy, I have now to consider whether he can claim indemnity against the defendant by virtue of Section 36 (4) of the Road Traffic Act, 1930.

" . . . the 'Eclipse' policy which I am considering provides that 'the insurance shall extend to indemnify any person who is driving on the assured's order or with his permission in respect of any legal liability as aforesaid,' that is, to third parties. It has been decided by the Judicial Committee in *Vandepitte* v. *Preferred Accident Insurance Corporation* (49 *The Times*, L.R. 90; 1933 A.C. 70) that this clause confers no rights on such a person, either at common law or in equity, unless there was an intention on the part of the insured to create a trust for such person, or unless the insured was acting with the privity and consent of such person so as to be contracting on his behalf. The question is therefore whether the statute has conferred a right of action on such a person, and thereby altered the law. Does the section merely mean that in spite of the provision of the Life Assurance Act, 1774, the insurer shall indemnify the *insured* against any liability which the policy purports to cover, or does it mean that, freed from any difficulties caused by the Life Assurance Act as to insurable interest, and as to the absence of any name in the policy other than that of the insured, the insurers shall indemnify everyone whom they have said they will indemnify in respect of the liability which they have indicated? In my judgment, both the policy of the Act and the words used point to the latter conclusion being the right one. The fact that the section mentions 'classes of persons' seems to me to

support this view. Accordingly I give judgment for the plaintiff, with costs."

THOMPSON *v.* ADAMS (1889), 23 Q.B.D. 361

The plaintiffs, a firm of merchants in New Zealand, in October, 1886, employed a firm of insurance brokers in London to effect for them insurances against fire upon goods in New Zealand. The brokers instructed B, an insurance broker at Lloyd's, to effect a portion of the insurances, and B prepared a slip containing particulars of the risk, which was initialed by the defendant and other underwriters at Lloyd's. Owing to a misunderstanding between the insurance brokers, no policy was put forward for signature by the defendant and the other underwriters, and in February, 1887, the goods in New Zealand were seriously damaged by fire. No premiums had then been paid, but two days after the fire the insurance premiums were paid by the plaintiffs to the insurance brokers. A policy was then tendered to the defendant for signature, but he refused to sign it or pay the amount for which he had initialed the slip. In an action to recover the amount—

Held, that the slip formed a complete and binding contract of insurance; that it was not subject to an implied condition that a policy should be put forward for signature within a reasonable time; and that, in the absence of circumstances showing an intention on the part of the plaintiffs to abandon the insurance, they were entitled to recover.

Mathew, J.: "The statute (Marine Insurance Act) does not apply, and there is no reason why a contract should not be entered into by the slip; there is every reason, indeed, to suppose that the parties would intend it to be a contract. . . ."

THOMSON *v.* WEEMS (1884), 9 A.C. 671

Lord Blackburn: "It is competent to the contracting parties, if both agree to it and sufficiently express their intention so to agree to make the actual existence of anything a condition precedent to the inception of the contract; and if they do so, the non-existence of that thing is a good defence. And it is not of any importance whether the existence of that thing was or was not material; the parties would not have made it part of the contract if they had not thought it material, and they have a right to determine for themselves what they shall deem material."

THORNTON-SMITH *v.* MOTOR UNION INSURANCE COMPANY, LIMITED (1913), 30 T.L.R. 139

The plaintiff insured a motor-car with an insurance company, but the company refused to renew the insurance, and he mentioned this fact to an agent of the defendants, another insurance company. The defendants' agent offered to propose him to the defendants, and the plaintiff, on receiving a proposal form with the question whether any company had refused to renew his insurance, spoke about it to the defendants' agent, who replied that he would make it all right. The plaintiff did not fill in any answer to the question. The company accepted the proposal and afterwards agreed that it should cover a new Vauxhall car. Subsequently the plaintiff insured a Siddeley car with the defendants, and they had notice that the plaintiff had had a previous insurance, but the spaces for answers to questions on the proposal form were left blank. Accidents occurred to both cars, and the defendants refused to pay on the ground

that the plaintiff had originally represented that no insurance company had refused to renew.

The plaintiff brought an action against the defendants for a declaration that the policies on the Vauxhall and Siddeley cars were valid. There was no evidence of any collusion between the plaintiff and the defendants' agent.

Held, that as the plaintiff had made full disclosure to the defendants' agent, and as there was no evidence of collusion, the plaintiff was entitled to the declaration.

But see *Biggar* v. *Rock Life Assurance Company*. See also *Bawden* v. *London, Edinburgh and Glasgow Assurance Co.*

TINLINE *v.* WHITE CROSS INSURANCE ASSOCIATION, LIMITED [1921] 3 K.B. 327

By a policy of insurance the assured was entitled to be indemnified against (*inter alia*) sums which he should become legally liable to pay to third parties as compensation for "accidental personal injury" caused through the driving of his motor-car. While driving his car at an excessive speed the assured knocked down three persons, injuring two and killing one, and in respect of this occurrence he was convicted of manslaughter on his own confession. Actions having been commenced against him, by the injured persons and by the representative of the person who was killed, for damages, the assured sued the insurance company for a declaration that he was entitled to be indemnified in respect of those claims.

Held, that the policy protected the assured against the civil consequences of accidents due to negligence, whether slight or great, that the injuries to the two persons and the death of the third were due to an "accident" within the meaning of the policy, that a policy covering risks of this nature was not void as against public policy, and, therefore, the assured was entitled to the declaration claimed.

Bailhache, J.: "... It must, of course, be clearly understood that if this occurrence had been due to an intentional act on the part of the plaintiff the policy would not protect him."

TOOTAL, BROADHURST *v.* LONDON AND LANCASHIRE FIRE INSURANCE CO. (1908)
(See *Welford & Otter-Barry*, Fire Insurance)

Bigham, J.: "The excuses for refusing to pay are to be found endorsed upon the policies, and they are as much part of the contract as that which is expressed on the front of the policy, by which they undertake to pay in the event of fire. The only difference is this, and it is an important difference, and one that you must bear in mind, that, whereas it is for the plaintiffs to show that their goods have been burnt, it is for the defendants to show to your satisfaction that the circumstances which constitute an excuse for non-payment of the claim have in fact arisen. To use common legal language, the onus of proof, so far as the excuse goes, is an onus which rests upon the defendant company. . . . And, finally, you must remember that this is what is called an exception on the policy, and it is for the defendants to satisfy you that the exception has arisen which excuses them. They must not leave your minds in any reasonable doubt about it, because if they do they may have not discharged the burden which is upon them."

In Re Universal Non-Tariff Fire Insurance Company
Forbes & Co.'s Claim (1875), L.R. 19 Eq. 485

A fire insurance was effected in respect of certain property through an agent named Donald, who inspected the premises. One condition of the policy was, that any material misdescription of the property would render the policy void. The buildings were described as built of brick and slated, but it turned out that one of the buildings was not roofed with slates but with tarred felt. The company alleged that Donald was not their agent, but the agent of the insured; and that the misdescription rendered the policy void.

Held, that the misdescription was immaterial, and not sufficient to vitiate the policy; but that if material, it was made by Donald, as the agent of the insurance company, and the insured were not responsible for it.

Sir R. Malins, V.C.: "Mr. Donald's affidavit of . . . contains a statement: 'The company had no surveyor in Glasgow at that time. I acted in the capacity of surveyor in examining the buildings, making the sketch referred to, and giving the necessary information to the office. . . .' Upon a careful consideration of this evidence, and of the other evidence in the case, I am of opinion that the description of the property was given to the company by Donald, as their agent, and did not proceed from the insured at all. . . ."

Uxbridge Permanent Benefit Building Society *v.* Pickard
(1939), 55 T.L.R. 579

The defendant was a solicitor practising in London, with a branch office at Slough. The branch office was in the charge of Conway, a managing clerk. On 6th April, 1936, Conway put forward to the plaintiffs an application for a loan by one Cox, who was represented to be a client of the defendant, intending to purchase a house in Slough from one Littleton, who was alleged to have acquired it in 1906 from one Kyedon. Both Littleton and Kyedon were fictitious persons, but forged deeds purporting to show the alleged devolution of title from Kyedon through Littleton to Cox were produced by Conway to the plaintiffs, who advanced £500 to Cox on mortgage of the house. When the deception was discovered, the plaintiffs brought proceedings against the defendant (against whom no personal charge whatever was made) to recover the £500 (less a small sum repaid to the plaintiffs) as damages for fraud or as money had and received to their use. Conway denied his complicity in the fraud and asserted that he himself was deceived, but on the issue of fact it was found that he was a party to the fraud, but not that he forged the deeds.

Held by the Court of Appeal that the defendant was liable for Conway's fraud, although the person defrauded was not the defendant's client and although the fraud was carried out by means of forgery.

Lloyd v. *Grace, Smith & Co.* (28, *The Times*, L.R. 547; [1912] A.C. 716) applied.

Vance *v.* Forster (1841), Ir. Circ. Rep. 47

Pennefather, B.: "It has been truly stated that a policy of insurance is a contract of indemnity, and that while the insured may name any sum he likes as the sum for which he will pay a premium, he does not by proposing that sum, nor does the company by accepting the risk, conclude themselves as to the amount which the plaintiff is to recover in consequence of the loss, because although the plaintiff cannot recover beyond the sum insured upon each particular item . . . he cannot recover even that sum

unless he proves that he has sustained damage, and then he will recover a sum commensurate with the loss he has sustained."

VANDEPITTE *v.* PREFERRED ACCIDENT INSURANCE CO. OF NEW YORK (1930), 49 T.L.R. 91

Section 24 of the Insurance Act of British Columbia, 1925, provides: "Where a person incurs liability for injury or damage to the person or property of another, and is insured against such liability, and fails to satisfy a judgment awarding damages against him in respect of such liability, and an execution against him in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied."

A minor while driving her father's motor-car, with his permission, collided with a motor-car in which the appellant was a passenger. Following the subsequent action, the appellant issued against the minor an execution in respect of the damages and costs awarded to her. That execution was returned unsatisfied, and the appellant thereupon proceeded by virtue of Section 24 of the British Columbia Insurance Act, 1925, against the respondents, the insurance company with whom the minor's father was insured in respect of the motor-car involved in the collision.

A clause in the policy extended the indemnity against third party risks to any person or persons legally operating the automobile for private or pleasure purposes with the permission of the insured.

Held, that on the facts the minor herself could not be held to be "insured" in law or in equity under the policy so as to entitle the appellant to recover from the respondent insurance company under Section 24 of the Act of 1925.

This was an appeal to the Judicial Committee of the Privy Council from a decision of the Supreme Court of Columbia.

Lord Wright, in giving judgment, said:

The first mode of stating the appellant's case involved that R. E. Berry, as his daughter's agent, made a contract of insurance between her and the respondents. But a contract can only arise if there is the *animus contrahendi* between the parties: there is here no evidence that Jean Berry ever had any conception that she had entered into any contract of insurance. . . . It is said that the wide words defining the persons to whom the indemnity is available are sufficient to found the inference that R. E. Berry was intending to contract not only on behalf of himself but of any one who might come within the policy words "any person or person while riding in or legally operating the automobile for private or pleasure purposes" with the appropriate permission, and reliance in support of this contention was placed on the well-known rule in regard to marine policies in which only the name of the agents need be stated. . . . But even under these wide words no one can claim the benefit of the policy, even if answering the general description, unless it is established that the person who directed the insurance to be effected actually intended to cover that particular person, or at least some one who should answer the description. The mere generality of the language is not in itself sufficient. . . . In the present case there is no evidence that R. E. Berry had any intention to insure anyone but himself: even if in some cases the words of the policy taken with the surrounding circumstances might be held to found the necessary inference of intention that inference would fail here

by reason of the statutory application. But even if he had so intended, he had no authority from Jean Berry to insure on her behalf, and at no time did she purport to adopt or ratify any insurance even if made on her behalf. In these circumstances it is impossible to say that a contract existed between Jean Berry and the respondents—that is, it cannot be held that she was in law "insured" under the policy. . . . Furthermore, there was no consideration proceeding from Jean Berry. . . .

In their Lordships' opinion the appeal should be dismissed, with costs.

WATERS *v.* MONARCH FIRE & LIFE INSURANCE CO. (1856), 5 E. & B. 870

A, a wharfinger and warehouseman, effected with a company a policy against fire on goods in trust or on commission. A was merely responsible to the owners for due diligence in their custody. The company contracted with him to make good any damage by fire to the property insured. He had in his warehouses goods belonging to his customers which were deposited with him in that capacity, and on which he had a lien for the charges for cartage and warehouse rent, but no further interest of his own. No charge was made to the customers for insurance, nor were they informed of the existence of the policy. His warehouse was consumed by fire, with all the goods in it. The company paid the value of his own goods, and the amount of his lien on his customers' goods, but refused to pay the value of the customers' interest in the value of the goods beyond the lien.

Held, that A was entitled to recover the full value of his customers' goods, notwithstanding that he was not liable to them to make good the loss.

WELCH *v.* ROYAL EXCHANGE ASSURANCE (1938), 55 T.L.R. 96

Condition IV of a fire insurance policy stated that the insured "shall also give to the corporation all such proofs and information with respect to the claim as may reasonably be required . . . and that no claim under this policy shall be payable unless the terms of this condition have been complied with."

In November, 1934, a fire occurred on the claimant's premises and much stock was destroyed. The claimant delivered to the insurers a claim in writing in respect of his loss by the fire, and, as provided by the policy, the claim was referred to arbitration. It was proved or admitted at the arbitration that—

(*a*) Information about all bank accounts used or controlled by the claimant for the purpose of his business was required by the insurers on several occasions, both before the arbitration began and before delivery of the unamended points of defence.

(*b*) Mrs. Welch, the mother of the claimant, had two banking accounts, a loan account, and a current account. Both of those accounts were used by the claimant for the purpose of his business. Large sums were paid by him into the account and large sums were drawn out by him for the purpose of his business.

(*c*) On being required by the insurers to give information concerning the bank accounts used by him for his business, the claimant failed to inform the insurers in respect of those two accounts of Mrs. Welch.

During the hearing of the arbitration the claimant for the first time

gave full information as to those two accounts of Mrs. Welch. Until the accounts were produced, the insurers were not in possession of sufficient information to allege the claimant's failure to give information in respect of the said accounts as a breach of Condition IV. The insurers then obtained leave to amend their points of defence with a contention that the claimant's failure to give the information about those accounts when required to do so constituted a breach of Condition IV, and that such breach precluded the claimant from recovering any sum under the policy.

The arbitrator found, subject to the opinion of the Court, that, though the information was reasonably required by the insurers, it did not, when disclosed, contain any material which justified the insurers in repudiating the claim; that there had been a breach of the condition, which was a condition precedent to the insurers' liability at the time when the arbitration proceedings began; that the insurers could rely on the breach when subsequently permitted to raise the point by amendment of their defence; and that the claimant was disentitled to recover. Held by the High Court and Court of Appeal that the claim failed.

WOODALL *v.* PEARL ASSURANCE COMPANY, LIMITED
[1919] 1 K.B. 593

In a proposal for insurance against accident, the intending assured stated his occupation and signed a declaration that the answers to the questions therein were true, and that he agreed that the declaration should be the basis of the contract between him and the insurance company whose policy, subject to the terms and conditions thereof, he agreed to accept. The policy recited the proposal and declaration, "which proposal and declaration warranted to be true it is agreed shall be the basis of the contract . . . and be considered as incorporated herein, and any suppression, misrepresentation, or misstatement of fact in such written proposal and declaration shall *ipso facto* render this policy null and void"; and it provided that it was a condition precedent to the recovery of any sum under the policy that the conditions endorsed thereon should be strictly observed. Condition 8 provided that the policy might be renewed from year to year, but, only upon condition that nothing had happened to increase the risk, and if the risk was increased by (*inter alia*) the assured engaging in some other occupation, then, "unless notice in writing of such increased risk is given to the company . . . and any extra premium that may be required paid . . . the policy is void and no claim can be made." By Condition 11, "If any question shall arise touching this policy or the liability of the company thereunder or the extent or nature of such liability or otherwise howsoever in connection herewith, then the assured and all persons claiming through the assured may refer and shall be bound, if the company shall so require, to refer the same to arbitration by one arbitrator to be agreed upon or in default of agreement by two arbitrators and their umpire under the Arbitration Act, 1889 . . . and no person shall be entitled to bring or to maintain any action or proceeding on this policy except for the sum awarded under such arbitration."

During the currency of the policy the assured was killed by an accident. The company denied liability under the policy on the ground that the assured had misstated his occupation in the proposal, or, if not, had changed his occupation for one involving increased risk, of which notice as required by Condition 8 had not been given to the company, and contended that the policy was therefore void, and they required the dispute to be referred to arbitration under Condition 11. In an action on the policy—

Held, that upon the company requiring arbitration, Condition 11 made the obtaining of an award a condition precedent to a right of action; and, secondly, that the company, by relying on the terms of the policy which rendered it void in certain events, did not thereby repudiate the policy as a binding contract between the parties, and were entitled to rely upon the arbitration clause as a defence to the action.

Banks, L.J.: ". . . It is necessary to draw a clear and sharp distinction between two separate classes of cases. One class is where the insurance company is repudiating a contract in the sense that they are disputing the existence of any binding contract at all. Jureidini's case falls within that class. The other is where the company is repudiating liability under the contract, but is accepting the existence of the contract as a binding contract. . . ."

See *Jureidini* v. *National British and Irish Millers' Insurance Co.*; and *Scott* v. *Avery*.

WOODFALL & RIMMER, LIMITED *v.* MOYLE AND ANOTHER
(1941), 58 T.L.R. 28

The plaintiffs held a Lloyd's employers' liability policy containing (*inter alia*) a provision that the proposal form was incorporated with and formed the basis of the policy and a condition that "the insured shall take reasonable precautions to prevent accidents. . . ." One of the questions in the proposal form was: "Are your machinery, plant and ways properly fenced and guarded, and otherwise in good order and condition?" to which the insured answered "Yes."

The plaintiffs, who were painters and decorators, were engaged in camouflaging the roof of a building described as a foundry or smithy. They had a number of workmen on a scaffold painting the inside of the roof when the scaffolding collapsed. The men fell to the ground, one of them died, and the others were seriously injured. The plaintiffs did not erect the scaffolding themselves, but left the matter to a competent and skilled foreman, selected and employed by them, and it appears that the foreman was negligent in selecting suitable and safe scaffolding material. In proceedings taken by the workmen against the plaintiffs, judgment was given in favour of the workmen.

The plaintiffs thereupon brought an action to recover an indemnity from Lloyd's under the policy. The underwriters contended that the insured had failed to comply with the contract in that they had not taken reasonable precautions to prevent accidents, and that their plant had not been kept in good order and condition for the whole duration of the policy. Judgment was given in favour of the insured both in the High Court and the Court of Appeal. It was held—

1. that on a true construction of the policy "reasonable precautions to prevent accidents" meant precautions which would satisfy the test of reasonableness as between the insured and the underwriters, and did not import all the matters which might be relevant in considering liability as between employer and workmen; the insured had taken precautions which were reasonable as between themselves and the underwriters; and

2. that the question as to the good order and condition of the insured's machinery, plant and ways referred only to the order and condition at the date of the proposal, and did not include any element of futurity whatever.

Re Yager and Guardian Assurance Company (1912), 108 L.T. 38

In October, 1909, the claimant effected a fire insurance policy for £2,000 with the L Company, renewable at Michaelmas, 1910, and in August, 1910, with the object of getting an increased insurance for £1,600, this policy was taken to the Guardian Assurance Company and a cover note for the £1,600 up to Michaelmas, 1910, was issued. It was arranged that the Guardian should issue a policy for the whole £3,600, and on the 21st September, 1910, the Guardian sent a statement showing the premium payable. At the side of this statement were the words "held covered," and underneath was the sum to be insured, £3,600, from Michaelmas, 1910, to Michaelmas, 1911, and the amount of the premium for the £1,600 up to Michaelmas, 1910, and a note in print that, "No insurance is in force until the premium is paid." On the 27th September, 1910, the claimant became aware that the L Company had refused to continue the policy for £2,000 beyond Michaelmas, 1910, but this fact was not communicated to the Guardian, and on the 28th September the Guardian executed the policy for £3,600 from Michaelmas, 1910, to Michaelmas, 1911, and on the next day the premium was paid and the policy forwarded, and endorsed upon it was the condition that any omission to state any material fact rendered the policy void. A fire having occurred and an arbitrator having found that the fact of the refusal of the L Company to renew the policy was a material fact which ought to have been communicated to the Guardian—

Held, that the fact that the L Company had refused to continue the policy was a material fact, that when this fact became known to the claimant on the 27th September, there was no *concluded contract*, and that it was still the duty of the claimant to disclose such fact to the Guardian, and, having omitted to do so, the claimant was not entitled to treat the policy as a valid policy.

Lord Alverstone, C.J.: "The document of the 21st September is not, in my opinion, a contract to insure for £3,600; it is a negotiation, an offer, and it really contains two matters—one, an offer to insure for £3,600 for the year from Michaelmas, 1910, and the other a statement that for £1 7s. the claimant was covered back from the 16th August till the 30th September on the £1,600. . . . There was, in the first place, on the face of the document to be no contract until the premium was paid. . . ."

APPENDIX II

STATUTES

In the following pages are given extracts from various Statutes to show the statutory foundation for certain rules affecting the principles and law of accident insurance.

The Statutes have been set forth in alphabetical order.

Arbitration Act, 1889, 52 & 53 Vict., c. 49

Sect. 1. A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the court or a judge, and shall have the same effect in all respects as if it had been made an order of the court.

Sect. 2. A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the first schedule to this Act, so far as they are applicable to the reference under the submission.

Sect. 4. If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

Sect. 6. Where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless the submission expresses a contrary intention—

(*a*) If either of the appointed arbitrators refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place;

(*b*) If, on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent:

Provided that the court or a judge may set aside any appointment made in pursuance of this section.

Sect. 7. The arbitrators or umpire acting under a submission shall, unless the submission expresses a contrary intention, have power—

(*a*) To administer oaths to or take the affirmations of the parties and witnesses appearing; and

(*b*) To state an award as to the whole or part thereof in the form of a special case for the opinion of the court; and

(c) To correct in an award any clerical mistake or error arising from any accidental slip or omission.

Sect. 12. An award on a submission may, by leave of the court or a judge, be enforced in the same manner as a judgment or order to the same effect.

Sect. 19. Any referee, arbitrator, or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the court or a judge, state in the form of a special case for the opinion of the court any question of law arising in the course of the reference.

Sect. 20. Any order made under this Act may be made on such terms as to costs, or otherwise, as the authority making the order thinks just.

Sect. 27. In this Act, unless the contrary intention appears—

"Submission" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.

"Court" means Her Majesty's High Court of Justice.

"Judge" means a judge of Her Majesty's High Court of Justice.

. . . . . .

First Schedule—

(a) If no other mode of reference is provided, the reference shall be to a single arbitrator.

(f) The parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection, submit to be examined by the arbitrators or umpire, on oath or affirmation, in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrators or umpire, all books, deeds, papers, accounts, writings, and documents within their possession or power respectively, which may be required or called for, and do all other things which during the proceedings on the reference the arbitrators or umpire may require.

(h) The award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively.

(i) The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client.

Arbitration Act, 1934, 24 & 25 Geo. 5, Ch. 14

Sect. 5 (1). The following paragraph shall be substituted for paragraph (b) of the First Schedule to the principal Act (which sets out certain provisions which are to be implied in an arbitration agreement unless the contrary intention is expressed therein)—

"(b) if the reference is to two arbitrators, the two arbitrators shall appoint an umpire immediately after they are themselves appointed": and in paragraph (c) of section five of the principal Act after the word "arbitrator" there shall be inserted the words "or where two arbitrators are required to appoint an umpire."

(2) At any time after the appointment of an umpire, however appointed, the court may, on the application of any party to the reference and notwithstanding anything to the contrary in the arbitration agreement, order that the umpire shall enter on the reference in lieu of the arbitrators and as if he were a sole arbitrator.

Sect. 16. . . . (6) Where the terms of an agreement to refer future disputes to arbitration provide that any claims to which the agreement

applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may, on such terms, if any, as the justice of the case may require, but without prejudice to the foregoing provisions of this section, extend the time for such period as it thinks proper.

ASSURANCE COMPANIES (WINDING UP) ACT, 1933, 23 & 24 GEO. 5, CH. 9

Sect. 1. A petition for the winding up of an Assurance Company on the grounds that it is unable to pay its debts within the meaning of Sections 168 and 169 of the Companies Act, 1929, may with the leave of the Court be presented by the Board of Trade.

Notes

(1) The power of the Board of Trade to petition for the winding up of an Assurance Company is derived from this Act, and not from the Assurance Companies Act, 1909.

(2) Sects. 168 and 169 of the Companies Act, 1929, were re-enacted by Sections 222 and 223 of the Companies Act, 1948.

(3) By the Assurance Companies Act, 1946, a company may be deemed to be unable to pay its debts if after two years of trading (or such longer period as the Board of Trade may allow) it is unable to comply with the standard of solvency laid down by the Act—see page 33—and the Board of Trade can take proceedings accordingly under the 1933 Act, whereas prior to the 1946 Act the Board of Trade could only intervene when there was actual insolvency.

(4) The distinction between the position before and since 1946 is important, as the trading of a company can now be arrested with reasonable likelihood of avoiding any material loss to policyholders, even though share capital may disappear. A very much greater measure of security is therefore assured to the public.

COMPANIES ACT, 1948, 11 & 12 GEO. 6, CH. 38

Sect. 1 (1). Any seven or more persons, or, where the company to be formed will be a private company, any two or more persons, associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with or without limited liability.

(2) Such a company may be either—

(*a*) A company having the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them (in this Act termed "a company limited by shares"); or

(*b*) A company having the liability of its members limited by the memorandum to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up (in this Act termed "a company limited by guarantee"); or

(*c*) A company not having any limit on the liability of its members (in this Act termed "an unlimited company").

Sect. 32 (1). Contracts on behalf of a company may be made as follows—

(*a*) A contract which if made between private persons would be by law required to be in writing, and if made according to English law to be under seal, may be made on behalf of the company in writing under the common seal of the company;

(*b*) A contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied;

(*c*) A contract which if made between private persons would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, express or implied.

(2) A contract made according to this section shall be effectual in law, and shall bind the company and its successors and all other parties thereto.

(3) A contract made according to this section may be varied or discharged in the same manner in which it is authorized by this section to be made.

Sect. 434. No company, association, or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any business (other than the business of banking) that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament, or of letters patent, or is a company engaged in working mines within the stannaries and subject to the jurisdiction of the court exercising the stannaries jurisdiction.

GAMING ACT, 1845, 8 & 9 VICT., C. 109

Sect. 18. All contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made: . . .

LAW OF PROPERTY ACT, 1925, 15 GEO. 5, CH. 20

Sect. 136 (1). Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice—

(*a*) the legal right to such debt or thing in action;

(*b*) all legal and other remedies for the same; and

(*c*) the power to give a good discharge for the same without the concurrence of the assignor:

Provided that, if the debtor, trustee or other person liable in respect of such debt or thing in action has notice—

(*a*) that the assignment is disputed by the assignor or any person claiming under him; or

(*b*) of any other opposing or conflicting claims to such debt or thing in action;

he may, if he thinks fit, either call upon the persons making claim thereto to interplead concerning the same, or pay the debt or other thing in action into court under the provisions of the Trustee Act, 1925.

(2) This section does not affect the provisions of the Policies of Assurance Act, 1867.

LAW REFORM (MISCELLANEOUS PROVISIONS) ACT, 1934, 24 & 25 GEO. 5, CH. 41

Sect. 3 (1). In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:

Provided that nothing in this section—

(*a*) shall authorize the giving of interest upon interest: or

(*b*) shall apply in relation to any debt upon which interest is payable as of right, whether by virtue of any agreement or otherwise; or

(*c*) shall affect the damages recoverable for the dishonour of a bill of exchange.

(2) Sections twenty-eight and twenty-nine of the Civil Procedure Act, 1833, shall cease to have effect.

LIFE ASSURANCE ACT, 1774, 14 GEO. 3, C. 48

Whereas it hath been found by experience that the making insurances on lives or other events wherein the assured shall have no interest, hath introduced a mischievous kind of gaming: for remedy whereof be it enacted that, from and after the passing of this Act—

Sect. 1. No insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made shall have no interest, or by way of gaming or wagering; and that every assurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever.

Sect. 2. It shall not be lawful to make any policy or policies on the life or lives of any person or persons or other event or events, without inserting in such policy or policies the person or persons' name or names interested therein, or for whose use, benefit, or on whose account such policy is so made or underwrote.

Sect. 3. In all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers, than the amount or value of the interest of the insured in such life or lives or other event or events.

Sect. 4. Provided always, that nothing herein contained shall extend or be construed to extend to insurances *bona fide* made by any person or persons on ships, goods, or merchandise; but every such insurance shall be as valid and effectual in the law as if this Act had not been made.

LIMITATION ACT, 1939, 2 & 3 GEO. 6, CH. 21

Sect. 2. (1) The following actions shall not be brought after the

expiration of six years from the date on which the cause of action accrued, that is to say—

(*a*) actions founded on simple contract or on tort;

(*c*) actions to enforce an award, where the submission is not by an instrument under seal.

(3) An action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued:

Provided that this subsection shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.

(4) An action shall not be brought upon any judgment after the expiration of twelve years from the date on which the judgment became enforceable, and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

Sect. 21. (1) No action shall be brought against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty or authority, unless it is commenced before the expiration of one year from the date on which the cause of action accrued:

Provided that where the act, neglect or default is a continuing one, no cause of action in respect thereof shall be deemed to have accrued, for the purposes of this subsection, until the act, neglect or default has ceased.

Sect. 22. If on the date when any right of action accrued for which a period of limitation is prescribed bv this Act, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of six years, or in the case of actions to which the last foregoing section applies, one year from the date when the person ceased to be under a disability or died, whichever event first occurred, notwithstanding that the period of limitation has expired.

Sect. 23. (4) Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment:

Provided that a payment of a part of the rent or interest due at any time shall not extend the period for claiming the remainder then due, but any payment of interest shall be treated as a payment in respect of the principal debt.

Sect. 24. (1) Every such acknowledgment as aforesaid shall be in writing and signed by the person making the acknowledgment.

(2) Any such acknowledgment or payment as aforesaid may be made by the agent of the person by whom it is required to be made under the last foregoing section, and shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged or, as the case may be, in respect of whose claim the payment is being made.

Sect. 27. (1) This Act and any other enactment relating to the limitation of actions shall apply to arbitrations as they apply to actions in the High Court.

The foregoing extracts are given only to indicate the periods of limitation. Reference to the full provisions of the Act is necessary when occasion arises to consider more fully the enforcement of rights.

ROAD TRAFFIC ACT, 1930, 20 & 21 GEO. 5, CH. 43

Sect. 35 (1). Subject to the provisions of this Part of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of this part of this Act.

Sect. 36 (1). In order to comply with the requirements of this part of this Act, a policy of insurance must be a policy which—

(*a*) is issued by a person who is an authorized insurer within the meaning of this Part of this Act; and

(*b*) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on a road:

Provided that such a policy shall not be required to cover—

(i) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or

(ii) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arise; or

(iii) any contractual liability.

(4) Notwithstanding anything in any enactment, a person issuing a policy of insurance under this section shall be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons.

Sect. 38. Any condition in a policy or security issued or given for the purposes of this Part of this Act, providing that no liability shall arise under the policy or security or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security, shall be of no effect in connection with such claims as are mentioned in paragraph (*b*) of subsect. (1) of section thirty-six:

Provided that nothing in this section shall be taken to render void any provision in a policy or security requiring the person insured or secured to repay to the insurer or the giver of the security any sums which the latter may have become liable to pay under the policy or security and which have been applied to the satisfaction of the claims of third parties.

Sect. 42 (1). Section one of the Assurance Companies Act, 1909, shall have effect as if after paragraph (*e*) thereof there were added the following paragraph—

"(*f*) motor vehicle insurance business, that is to say, the business of effecting contracts of insurance against loss of, or damage to or arising out of or in connection with the use of motor vehicles including third-party risks."

(2) Where an assurance company within the meaning of the Assurance Companies Act, 1909, carries on motor vehicle insurance business, that

Act shall apply with respect to that business in the same way as it applies to accident insurance business subject to the following modifications—

(*a*) If the company does not also carry on assurance business of some other class, the reference in subsect. (1) of section two of that Act to the sum of twenty thousand pounds shall be construed as a reference to the sum of fifteen thousand pounds;

(*b*) If the company also carries on assurance business of some other class, the reference in subsect. (4) of the said section two to a sum of twenty thousand pounds shall, as respects the motor vehicle insurance business, be construed as a reference to a sum of fifteen thousand pounds, and, notwithstanding anything in the said Act relieving a company from making a deposit in respect of any class of insurance business where it has made a deposit in respect of any other class of assurance business, the total sum to be deposited under the said subsect. (4) shall in no case be less than thirty-five thousand pounds;

(*c*) Sections five and six and paragraphs (*a*), (*b*), and (*c*) of section thirty-two of that Act shall not apply.

ROAD TRAFFIC ACT, 1934, 24 & 25 GEO. 5, CH. 50

Sect. 10 (1). If, after a certificate of insurance has been delivered under subsect. (5) of section thirty-six of the principal Act to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (*b*) of subsect. (1) of section thirty-six of the principal Act (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(3) No sum shall be payable by an insurer under the foregoing provisions of this section, if, in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy, he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within seven days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled, if he thinks fit, to be made a party thereto.

(5) In this section the expression "material" means of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk, and, if so, at what premium and on what conditions, and the expression "liability covered by the terms of the policy" means

a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel, or has avoided or cancelled the policy.

Sect. 12. Where a certificate of insurance has been delivered under subsect. (5) of section thirty-six of the principal Act to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any of the following matters—

(*a*) the age or physical or mental condition of persons driving the vehicle; or

(*b*) the condition of the vehicle; or

(*c*) the number of persons that the vehicle carries; or

(*d*) the weight or physical characteristics of the goods that the vehicle carries; or

(*e*) the times at which or the areas within which the vehicle is used; or

(*f*) the horse-power or value of the vehicle; or

(*g*) the carrying on the vehicle of any particular apparatus; or

(*h*) the carrying on the vehicle of any particular means of identification other than any means of identification required to be carried by or under the Roads Act, 1920;

shall as respects such liabilities as are required to be covered by a policy under paragraph (*b*) of subsect. (1) of section thirty-six of the principal Act, be of no effect:

Provided that nothing in this section shall require an insurer to pay any sum in respect of the liability of any person otherwise than in or towards the discharge of that liability, and any sum paid by an insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this section shall be recoverable by the insurer from that person.

STATUTE OF FRAUDS, 1677, 29 CAR. II, C. 3

Sect. 4. From and after the said four and twentieth day of June no action shall be brought—

(1) whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate;

(2) or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person;

(3) or to charge any person upon any agreement made upon consideration of marriage;

(4) or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them;

(5) or upon any agreement that is not to be performed within the space of one year from the making thereof;

unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

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